8 1

Supreme Court, U.S.
FILED
06-948 JAN 08 2007
OFFICE OF THE CLERK

(1)

No. 06-___

IN THE

Supreme Court of the United States

BERTRAM SACKS,

Petitioner,

v.

OFFICE OF FOREIGN ASSETS CONTROL, United States Department of the Treasury; R. RICHARD NEWCOMB, Director, Office of Foreign Assets Control,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Donald B. Scaramastra
Counsel of Record
Gary D. Swearingen
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

January 8, 2007

QUESTIONS PRESENTED

On several occasions before the Second Gulf War, Petitioner Bertram Sacks transported medicine to civilian hospitals in Iraq for use by children and other civilian patients. Mr. Sacks did so with several other members of an unincorporated association known as Voices in the Wilderness.

At the time, the federal Office of Foreign Assets Control and its director, Richard Newcomb (collectively referred to as the "agency") had prohibited travel to Iraq. The agency had also banned unlicensed humanitarian exports of food and medicine to Iraqi civilians. It did so even though UN Security Council Resolutions, Presidential Executive Orders, and federal statutes pertaining to Iraq did not authorize an absolute embargo on humanitarian exports, an embargo that would have violated international law.

In response to Mr. Sacks's actions, the agency sent Mr. Sacks and Voices a joint prepenalty notice that charged: "you and Voices in the Wilderness ('VW') have engaged in certain prohibited transactions" that "concern your and VW's exportation of donated goods, including medical supplies and toys, to Iraq." When Mr. Sacks admitted to exporting medicine, the agency sent him a penalty notice: "You admitted the [Prepenalty] Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval." Based on this admission, the agency found that Mr. Sacks had "violated the Regulations as alleged in Count 6 of the Notice" and imposed a $10,000 civil penalty. The agency fined Voices separately for exporting medicine.

The Ninth Circuit held that notwithstanding these penalties, Mr. Sacks lacked standing to challenge the agency's prohibition of humanitarian exports. The Ninth Circuit recognized that Mr. Sacks had standing to challenge the agency's travel ban, but held that Congressional statutes authorized such a ban, even if it had the intended effect of preventing humanitarian aid from reaching Iraqi children and other civilians.

Mr. Sacks now petitions for a writ of certiorari. The petition raises two questions:

1. Does Mr. Sacks have standing to challenge the agency's civil penalty and its direct or indirect restrictions on humanitarian exports of food and medicine to Iraqi civilians and children?

2. Are the agency's direct and indirect restrictions on humanitarian exports of food and medicine to Iraqi civilians and children, through a travel ban or otherwise, lawful and enforceable as a matter of both international and domestic U.S. law?

TABLE OF CONTENTS

Page

INTRODUCTION AND BACKGROUND 1
STATEMENT OF THE CASE 8
REASONS FOR GRANTING THE WRIT 14
I. The Ninth Circuit's Erroneous Ruling on Standing Will Prevent Judicial Scrutiny of Regulations like Those at Issue Here 15
A. Injury in Fact 16
B. Causation and Redressability 20
II. A Prohibition on Humanitarian Donations Violates International Law That Congress Has Not Abrogated 22
A. International Law Forbids the Deliberate, Mass Starvation of Children and Other Civilians 23
B. The UN Participation Act Does Not Authorize an Embargo on Humanitarian Aid 28
C. The Iraq Sanctions Act of 1990 Does Not Authorize an Embargo on Humanitarian Aid 29
III. Conclusion 29

TABLE OF CITED AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. Art. 6 26

CASES

Babbitt v. United Farm Workers, 442 U.S. 289 (1979) 17, 18

Doe v. Bolton, 410 U.S. 179 (1973) 19

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 21

Heckler v. Mathews, 465 U.S. 728 (1984) 16

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 27

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 16, 22

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 15, 20

Murray v. Charming Betsy, 6 U.S. 64 (1804) 27

O'Shea v. Littleton, 414 U.S. 488 (1974) 18

Office of Foreign Assets Control v. Voices in the Wilderness, No. 03-1356 (JDB) (D.D.C. July 9, 2004), at 2 12

Pennell v. City of San Jose, 485 U.S. 1 (1988) 16, 19

Poe v. Ullman, 367 U.S. 497 (1961) 18

REP. NO. 99-2, pt. I, *reprinted in* 28 I.L.M. 754, 762 (1989). 25

:cks v. Office of Foreign Assets Control, 466 F.3d 764, 2006 U.S. App. LEXIS 25294 (9th Cir. 2006) xi

mon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 22

zel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 15, 21

:e Paquete-Habana, 175 U.S. 677, 700 (1900) 23

rth v. Seldin, 422 U.S. 490 (1975) 16

:inberger v. Rossi, 456 U.S. 25 (1982) 27

hitney v. Robertson, 124 U.S. 190, 194 (1888) 27

ungstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) 27

'ATUTES AND LEGISLATIVE MATERIALS

U.S.C. § 287c ..... xi, 28

U.S.C. § 1254(1) x

U.S.C. § 1331 12

U.S.C. § 1337 12

U.S.C. § 1346(a)(2) 12

U.S.C. § 2461(a) 12

ternational Emergency Economic Powers Act ("IEEPA") § 203(b) 26

aq Sanctions Act, Pub. L. 101-513, § 586C ..... xi, 8, 9, 29

Iraq: Are Sanctions Collapsing?: Joint Hearing before the Senate Committee on Foreign Relations and the Senate Committee on Energy and Natural Resources, 105th Cong., S. Hrg. 105-650, at 59-60 (1998) 7

REGULATORY MATERIALS

31 CFR § 575 9

31 CFR § 575.205 ..... xi, 9

31 CFR § 575.207 ..... xi, 10

56 Fed. Reg. 2113 (Jan. 18, 1991) 9, 29

Executive Order 12,722, 55 F.R. 31803 (Aug. 2, 1990), reprinted in 50 U.S.C. § 1701 note xi

Executive Order 12,724 § 2(b), 55 F.R. 33089 (Aug. 9, 1990), reprinted in 50 U.S.C. § 1701 note xi

Executive Order 13350, 69 Fed. Reg. 46055 (July 30, 2004) 23

COURT RULES

Fed. R. Civ. P. 12(b)(6) 12

TREATIES AND OTHER INTERNATIONAL MATERIALS

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 ..... xi, 25

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. ..... xi, 25

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 xi

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *done on* May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) 26

Optional Protocol to the Convention on the Rights of the Child, United States Dept. of State, Treaties in Force (2006), at 389-90. 26

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990) ..... xi, 2, 8

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948) ..... xi, 24

Vienna Convention on the Law of Treaties, *done on* May 23, 1969, art. 53, 1155 U.N.T.S. 331 23

SECONDARY SOURCES

Alberto Ascherio, et al., *The Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. at 931 (Sept. 24, 1992) 4

Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1 ..... 1, 3

CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.5, at 879 (2004 supp. 21

Iraq Water Treatment Vulnerabilities, Defense Intelligence Agency (Jan. 18, 1991) 2

Leon Eisenberg, *The Sleep of Reason Produces Monsters -- Human Costs of Economic Sanctions*, 336 NEW ENGLAND JOURNAL OF MEDICINE, at 1248-50 (April 24, 1997) 4

MARC BOSSUYT, THE ADVERSE CONSEQUENCES OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF HUMAN RIGHTS (2000) ¶ 71 7

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). 27

The Harvard Study Team, *The Effect of the Gulf Crisis On the Children of Iraq*, 325 New Eng. J. Med. 977-80 (1991) 4

U.S. Department of State Dispatch, Vol. 2, No. 21, May 27, 1991 3

UNICEF, THE SITUATION OF CHILDREN IN IRAQ, at 11 (2003) 6

Opinions and Orders Below

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 2006 U.S. App. LEXIS 25294 (9th Cir. 2006) and is reprinted in the appendix. The opinion of the United States District Court for the Western District of Washington is unpublished and is reprinted in the appendix.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals issued its opinion on October 10, 2006. Neither side petitioned for rehearing or for hearing by the Ninth Circuit *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The following are the principal constitutional provisions, treaties, UN Security Council Resolutions, statutes, regulations, and executive orders that are involved in the case. Excerpts from these materials are set forth in the appendix.

United Nations Participation Act, 22 U.S.C. § 287c.

Iraq Sanctions Act, Pub. L. 101-513, § 586C.

Executive Order 12,722, 55 F.R. 31803 (Aug. 2, 1990), reprinted in 50 U.S.C. § 1701 note.

Executive Order 12,724 § 2(b), 55 F.R. 33089 (Aug. 9, 1990), reprinted in 50 U.S.C. § 1701 note.

31 CFR § 575.205.

31 CFR § 575.207.

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990).

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).

INTRODUCTION AND BACKGROUND

In 1990, the United States began a years-long military and economic campaign that targeted Iraq's civilian population, contributing to the mass deaths of children and other civilians there. The regulations at issue here, and under which petitioner Bertram Sacks was fined, were part of that effort.

Bombing worked hand in hand with an embargo, exacerbating its effect. This was intended, one military planner explained to the Washington Post:

> The worst civilian suffering, senior [American] officers say, has resulted not from bombs that went astray but from precision-guided weapons that hit exactly where they were aimed --- at electrical plants, oil refineries and transportation networks. ..."People say, 'You didn't recognize that it was going to have an effect on water or sewage,'" said the planning officer. "Well, what were we trying to do with [United Nations-approved economic] sanctions -- help out the Iraqi people? No. What we were doing with the attacks on infrastructure was to accelerate the effect of the sanctions."[1]

Before the First Gulf War, U.S. officials were aware of the potential consequences of targeting Iraq's infrastructure. In January 1991, just as the First Gulf War was beginning and six months into the embargo, the Pentagon's Defense Intelligence Agency projected that the embargo would cause Iraq's ability to provide clean drinking water to collapse within six months. Chemicals for water treatment, the agency noted, were "depleted or nearing depletion," chlorine supplies were "critically low,"

---

[1] Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1.

the main chlorine-production plants had been shut down, and industries such as pharmaceuticals and food processing were already becoming incapacitated. "Unless the water is purified with chlorine," the agency concluded, "epidemics of such diseases as cholera, hepatitis, and typhoid could occur."[2]

After the war, the United Nations Secretary- General dispatched a mission to assess the situation in Iraq.[3] The mission reported that the ware had "wrought near-apocalyptic results," that the bombing had relegated Iraq "to a pre-industrial age," and warned that Iraq could face "epidemic and famine if massive life-supporting needs are not rapidly met."[4] The report called for an immediate end to the embargo on imports of food and other essential supplies to prevent "imminent catastrophe."[5]

The U.S. embargo's initial goal was to force an Iraqi withdrawal from Kuwait. This was consistent with Security Resolution 661, which called for sanctions "to secure compliance with paragraph 2 of resolution 660," which in turn "demand[ed] that Iraq withdraw immediately and unconditionally " from Kuwait.[6]

But after the First Gulf War ended, U.S. officials expanded the embargo's objective had expanded to encompass the removal of Saddam Hussein from power. In a May 22, 1991 written statement prepared for delivery to the Subcommittee on Foreign Operations of the House Appropriations Committee, then-Secretary of State James Baker announced: "[W]e will act with others to continue to

---

[2] *Iraq Water Treatment Vulnerabilities*, Defense Intelligence Agency (Jan. 18, 1991).

[3] *See* Amended Complaint ¶ 8. A copy of the report is available on the UN's website at http://www.un.org/Depts/oip/background/reports/s22366.pdf.

[4] *Id.*

[5] *Id.*

[6] S.C. Res. 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990), *available on-line at* http://www.un.org/Docs/scres/1990/scres90.htm, *last visited 4/8/05.*

isolate Saddam's regime. ... That means maintaining UN sanctions in place so long as Saddam remains in power."[7]

Military planners explained the logic underlying this decision:

> Col. John A. Warden III, deputy director of strategy, doctrine and plans for the Air Force, agreed that one purpose of destroying Iraq's electrical grid was that "you have imposed a long-term problem on the leadership that it has to deal with sometime."
>
> "Saddam Hussein cannot restore his own electricity," he said. "He needs help. If there are political objectives that the U.N. coalition has, it can say, 'Saddam, when you agree to do these things, we will allow people to come in and fix your electricity.' It gives us long-term leverage."
>
> Said another Air Force planner: "Big picture, we wanted to let people know, 'Get rid of this guy and we'll be more than happy to assist in rebuilding. We're not going to tolerate Saddam Hussein or his regime. Fix that, and we'll fix your electricity.'"[8]

But the embargo remained in effect. As expected and intended, its post-war continuation prevented Iraq from rebuilding water and sewage treatment plants – and the electric-generating plants used to power them – that were destroyed during the First Gulf War.[9] This, and the resulting lack of potable water, had widespread lethal consequences that were visited with particular ferocity on

---

[7] U.S. Department of State Dispatch, Vol. 2, No. 21, May 27, 1991.

[8] Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1.

[9] Amended Complaint ¶ 18.

children under five.[10] In 1992 the New England Journal of Medicine reported:

> strong evidence that the Gulf war and trade sanctions caused a threefold increase in mortality among Iraqi children under five years of age. We estimate that an excess of more that 46,900 children died between January and August 1991.[11]

In 1997, the same journal reported:

> The destruction of the country's power plants had brought its entire system of water purification and distribution to a halt, leading to epidemics of cholera, typhoid fever, and gastroenteritis, particularly among children. Mortality rates doubled or tripled among children admitted to hospitals in Baghdad and Basra. Cases of marasmus appeared for the first time in decades. The team observed "suffering of tragic proportions.... [with children] dying of preventable diseases and starvation." Although the allied bombing had caused few civilian casualties, the destruction of the infrastructure resulted in devastating long-term effects on health.[12]

Since 1992, sanctions have contributed to the deaths of three to six thousand children under five in Iraq every

---

[10] *Id.*

[11] Alberto Ascherio, et al., *The Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. at 931 (Sept. 24, 1992); *see also* Amended Complaint ¶ 19.

[12] Leon Eisenberg, *The Sleep of Reason Produces Monsters -- Human Costs of Economic Sanctions*, 336 NEW ENGLAND JOURNAL OF MEDICINE, at 1248-50 (April 24, 1997) (citing The Harvard Study Team, *The Effect of the Gulf Crisis On the Children of Iraq*, 325 New Eng. J. Med. 977-80 (1991).

month.[13] According to UNICEF's Director, sanctions reversed a decades-long decline in infant mortality in Iraq.[14] She relied upon UNICEF reports that between 1991 and 1998, this reversal contributed to the deaths of a half million children under five.

Page 3 of a 2000 UNICEF report entitled "UNICEF in Iraq" warned: "Mounting evidence shows that the sanctions are having a devastating humanitarian impact on Iraq."[15] UNICEF quoted a 1997 report by the UN Human Rights Committee, which lamented that "the effect of sanctions and blockades has been to cause suffering and death in Iraq, especially to children."[16]

In 2003, UNICEF published another report, entitled "The Situation of Children in Iraq.[17] Page 13 of that report stated that a country like Iraq, which had an infant mortality rate of 40-60 deaths per 1,000 live births in 1990, was expected to achieve a rate of 20-30 by 2003.[18] Instead, the infant mortality rate in southern and central Iraq climbed to 107 deaths per 1,000 live births by 1999.[19] There was a similar upswing in the under-five mortality rate, which nearly tripled between 1985 and 1999.[20] UNICEF attributed the increase in childhood mortality in Iraq to economic sanctions.[21]

The "oil-for-food" program failed to eliminate widespread embargo-related infant and child mortality[22] and the first two directors of the oil-for-food program resigned from the UN in protest.[23] The first, Denis Halliday, explained:

---

[13] Amended Complaint ¶ 19.
[14] Amended Complaint ¶ 21.
[15] Amended Complaint ¶ 20.
[16] *Id.*
[17] Amended Complaint ¶ 22; *see* http://unicef.org/publications/index_4439.html, *last visited 4/8/05.*
[18] Amended Complaint ¶ 22.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Amended Complaint ¶ 26.
[23] Amended Complaint ¶ 27.

> Malnutrition is running at about 30 percent for children under 5 years old. In terms of mortality, probably 5 or 6 thousand children are dying per month. This is directly attributable to the impact of sanctions, which have caused the breakdown of the clean water system, health facilities and all the things that young children require. . . . I do not want to administer a program that results in these kinds of figures.[24]

He later warned: "We are in the process of destroying an entire society. It is as simple and terrifying as that."[25]

The second director, Hans von Sponeck, resigned after he "became aware that I was associated with a policy of implementing an oil-for-food program that could not possibly meet the needs of the Iraqi people."[26] "If we continue this policy when we fully recognize its consequences," he warned, "we move toward genocide."[27]

UNICEF reports confirm that the oil-for-food program "did not greatly improve conditions for most Iraqis. This is partly because revenue has not been sufficient to comprehensively rehabilitate the country's infrastructure."[28] UNICEF's 2003 report, cited above, concluded: "since the introduction of the Oil for Food Programme, the nutritional status of children has not improved. One in five children in the south and centre of Iraq remain so malnourished that they need special feeding, and child sickness rates continue to be alarmingly high."[29]

---

[24] *Id.*

[25] *Id.*

[26] Amended Complaint ¶ 28.

[27] Amended Complaint ¶ 28.

[28] Amended Complaint ¶ 29.

[29] Amended Complaint ¶ 29; *see* UNICEF, THE SITUATION OF CHILDREN IN IRAQ, at 11 (2003).

Meanwhile, a 2000 working paper for the Office of the UN High Commissioner for Human Rights concluded, "The sanctions regime against Iraq is unequivocally illegal under existing international humanitarian law and human rights law. Some would go as far as making a charge of genocide."[30]

Many in government not only anticipated these consequences, they were aware or accepted them as they unfolded. In 1996, for example, then-UN Ambassador Madeleine Albright was asked: "We have heard that a half million children have died. I mean, that's more children than died in Hiroshima. ... [I]s the price worth it?"[31] She responded, "I think this is a very hard choice, but the price -- we think the price is worth it."[32] Two years later, in a prepared statement submitted to a May 21, 1998 joint hearing before the Senate Committees on Foreign Relations and on Energy and Natural Resources, Senator Larry Craig insisted: "The use of food as a weapon is wrong. Starving populations into submission is poor foreign policy."[33]

In response to this, Mr. Sacks transported medicine to children and other civilians in Iraq. He expected to incur the ire of the authorities by doing so. This, he expected and hoped, would put the U.S. embargo before the judiciary of the United States, where the rule of law prevails. And there he proposed to ask the question: Is the deliberate targeting of children and civilian populations – with resulting mass

---

[30] MARC BOSSUYT, THE ADVERSE CONSEQUENCES OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF HUMAN RIGHTS (2000) ¶ 71. This report is available on-line at www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/c56876817262a5b2c125695e0050656e/$FILE/G0014092.doc, *last visited April 8, 2005.*

[31] Amended Complaint ¶ 25.

[32] *Id.* Ms. Albright later expressed regret for this statement, but insisted that sanctions were justified notwithstanding the "starvation" and "horrors" they caused. *Id.*

[33] *Iraq: Are Sanctions Collapsing?: Joint Hearing before the Senate Committee on Foreign Relations and the Senate Committee on Energy and Natural Resources*, 105th Cong., S. Hrg. 105-650, at 53-60 (1998).

deaths – legal under peremptory norms of international law (also known as "jus cogens"), norms from which civilized nations may not legally depart.

STATEMENT OF THE CASE

1. The U.S. embargo of Iraq has its genesis in Executive Orders 12,722 and 12,724, which the first President Bush issued in response to the Iraqi occupation of Kuwait.[34] These orders prohibited certain economic transactions with Iraq but exempted "donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes."[35]

Meanwhile, the UN Security Council issued Resolution 661,[36] which called for certain economic sanctions but also exempted "supplies intended strictly for medical purposes" and "payments exclusively for strictly medical or humanitarian purposes."[37] UN sanctions were limited to the purpose of securing Iraq's departure from Kuwait.[38]

On November 5, 1990, Congress enacted the Iraq Sanctions Act of 1990,[39] which approved President Bush's two executive orders.[40] The orders' exemption for humanitarian aid did not escape Congress's notice, for the Act expressly referred to them and the fact that they "were established by the United States pursuant to United

---

[34] Exec. Order No. 12,722, 55 F.R. 31803 (Aug. 2, 1990) (emphasis added), *reprinted in* 50 U.S.C. § 1701 note; Exec. Order No. 12,724, 55 F.R. 33089 (Aug. 9, 1990) (emphasis added), *reprinted in* 50 U.S.C. § 1701 note.

[35] Exec. Order 12,722, § 2(b); *see also* Exec. Order 12,724, § 2(b).

[36] S.C. Res. 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990), *available on-line at* http://www.un.org/Docs/scres/1990/scres90.htm, *last visited 4/8/05.*

[37] *Id.* §§ 3(c) & 4.

[38] *See supra* note 6.

[39] P.L. 101-513, *see* 50 U.S.C. § 1701 note.

[40] P.L. 101-513, § 586C(a).

Nations Security Council Resolution 661 ...."[41] Finally, the Act required that:

> [a]ny regulations issued after the date of enactment of this Act with respect to the economic sanctions imposed with respect to Iraq and Kuwait by the United States under Executive Orders Numbered 12722 and 12723 (August 2, 1990) and Executive Orders Numbered 12724 and 12725 (August 9, 1990) shall be submitted to the Congress before those regulations take effect.[42]

On January 18, 1991, the agency promulgated regulations that imposed trade sanctions on Iraq,[43] but the Federal Register contains no indication that the agency submitted its regulations to Congress beforehand as required.[44] Unlike Executive Orders 12,722 and 12,724 and Resolution 661, these regulations prohibited the unlicensed export of "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes."[45] Theoretically, the regulations allowed one to obtain a license, but they stated no criteria, and imposed no deadline, by which the agency would consider applications for such licenses.[46] The agency refused to answer a Freedom of Information Act request for information concerning its handling of license applications.[47] Together, the agency's regulations forbade U.S. citizens from either sending or bringing humanitarian aid to Iraq. The first, which the lower courts named the "Medicine Restriction," was 31 CFR § 575.205. The second,

---

[41] *Id.* § 586C(b).
[42] *Id.* § 586C(c)(1).
[43] 31 CFR Part 575; Amended Complaint ¶ 9.
[44] 56 Fed. Reg. 2113 (Jan. 18, 1991).
[45] Amended Complaint ¶ 11; 31 CFR § 575.205.
[46] Amended Complaint ¶ 11; 31 CFR § 575.205.
[47] Amended Complaint ¶ 44.

which the lower courts called the "Travel Ban," was 31 CFR § 575.207.

2. Mr. Sacks responded to the humanitarian catastrophe – wrought in significant part by the agency's implementation of the U.S. embargo – by bringing medicine and medical supplies to patients in Iraqi civilian hospitals on several occasions.[48] In November 1997, Mr. Sacks helped bring roughly $40,000 worth of medicine for this purpose.[49] His trip received national media coverage.[50] In December 1998, the agency responded with a written "Prepenalty Notice" that was jointly addressed to Mr. Sacks, several other individuals, and an organization called Voices in the Wilderness.[51]

"[Y]ou and Voices in the Wilderness ('VW')," the prepenalty notice began, "have engaged in certain prohibited transactions."[52] These violations, the notice continued, "concern your and VW's exportation of donated goods, including medical supplies and toys, to Iraq."[53] Count 6 of the notice charged: "Between on or about November 21-30, 1997 ... Sacks ... engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals."[54]

The agency proposed a $10,000 penalty[55] and invited a response from Mr. Sacks as to all of the charges, **including the charges against Voices**.[56] Mr. Sacks responded by admitting that he donated medical supplies,[57] explaining:

---

[48] Amended Complaint ¶ 13.

[49] *Id.*

[50] Amended Complaint ¶ 15.

[51] *Id.*

[52] Amended Complaint, Ex. 1, at 1.

[53] *Id.*

[54] Amended Complaint, Ex. 1, at 2.

[55] Amended Complaint, Ex. 1, at 3.

[56] *Id.*

[57] Amended Complaint ¶ 16.

> The decision to turn to civil disobedience to end sanctions, in public defiance of the laws you are entrusted with enforcing, was not a natural one for me.... In deciding to publicly violate sanctions, two events and two people played an important role for me. [One was] knowing that 150 years ago it was the highest law of the United States of America that runaway slaves from the South were legally "stolen property" of their owners. Anywhere in this country, an American was breaking the law to help such a slave escape via the "underground railroad." The people I greatly admire from this terrible era in our history were not law-abiding citizens, but those who broke the law to help slaves....[58]

Nearly four years later, the Agency sent Mr. Sacks a May 2002 "Penalty Notice"[59] that claimed: "You admitted the [Prepenalty] Notice's allegation in Count 6 **that you exported goods to Iraq absent prior OFAC approval** .... OFAC notes that you have admitted to Count 6 alleged in the Notice. . . ."[60] Based on this admission, the agency found that Mr. Sacks had "violated the Regulations as alleged in Count 6 of the Notice" and imposed a $10,000 penalty.[61]

In August 2003, an organization named Ocwen Federal Bank wrote Mr. Sacks to advise that the agency had retained it to collect the penalty.[62] Meanwhile, the agency sued Voices to collect a penalty for exporting medical supplies to Iraq.[63] The district court in that case noted that Voices "is an unincorporated association of individuals," that "Voices delegations delivered medical supplies to Iraq"

---

[58] Amended Complaint ¶ 16.
[59] Amended Complaint ¶ 41.
[60] Amended Complaint, Ex. 2, at 1 (emphasis added).
[61] Amended Complaint, Ex. 2, at 2.
[62] Amended Complaint ¶¶ 46 & 47.
[63] *Id.*

without obtaining a license,[64] and that Voices' website was www.vitw.us/who_we_are.[65] That website, in turn, identifies Mr. Sacks as a "representative" of Voices. In addition, the agency's motion to dismiss warned of further enforcement efforts, stating that it "reserve[d] the right" to "act[] in response to Plaintiff's eight other trips to Iraq."[66]

Thus, Mr. Sacks was faced with a three-fold threat: (1) the agency's penalty based on Mr. Sacks's admission that he "exported goods to Iraq"; (2) a possible agency attempt to collect its judgment against Voices from Mr. Sacks, a judgment premised on Voices' export of medicine to Iraq; and (3) the agency's threat to seek further penalties from Mr. Sacks for violating its ban on humanitarian exports. This suit followed.

3. Mr. Sacks filed this action on January 14, 2004 and amended his complaint shortly thereafter. He challenged the agency's restriction on humanitarian donations of medicine and other medical supplies, and its ban on travel for the purpose of making such donations.

The district court had subject matter jurisdiction of the action under 28 U.S.C. § 1331 (as it arose under the laws of the United States); 28 U.S.C. § 1337 (as it arose under an Act of Congress regulating commerce), under 28 U.S.C. § 1346(a)(2) (as it was an action against the United States founded upon federal law that involved more than $10,000), and under 28 U.S.C. § 2461(a) (as the court had jurisdiction of the agency's underlying claims).

The agency moved to dismiss under Fed. R. Civ. P. 12(b)(6). After Mr. Sacks served discovery requests and initial disclosures, the agency requested, and the district court granted, a stay of discovery and initial disclosures until the agency's motion to dismiss was decided.[67]

---

[64] *Office of Foreign Assets Control v. Voices in the Wilderness*, No. 03-1356 (JDB) (D.D.C. July 9, 2004), at 2; *see also* Amended Complaint ¶ 46.

[65] *Office of Foreign Assets Control v. Voices in the Wilderness*, at 2.

[66] Motion to Dismiss, at 5 n.4.

[67] A copy of the protective order staying discovery appears in the Appendix.

The district court granted the agency's motion to dismiss in part. The district court held that the agency's regulations required it to refer its civil penalty to the Justice Department for enforcement in a civil proceeding rather than collect its fine extra-judicially. (The Ninth Circuit subsequently affirmed this ruling.)

But the district court ruled that the agency had not exceeded its authority by prohibiting U.S. citizens from bringing or sending humanitarian aid to Iraq. After acknowledging that Mr. Sacks "present[ed] a compelling argument" that the agency transgressed statutory limits, the court concluded that the Iraq Sanctions Act authorized those regulations,[68] even if the Act ran counter to international treaties or customary international law. The court went so far as to hold that the Geneva Convention "is not binding on the United States."[69]

Mr. Sacks timely appealed the district court's decision and the agency timely cross-appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal, although on different grounds. Pertinent to this petition, the Ninth Circuit held that Mr. Sacks lacked standing to challenge the agency's prohibition on humanitarian exports of food and medical supplies to Iraq. While agreeing that Mr. Sacks satisfied all other elements of standing and ripeness,[70] the court concluded that his "fear of prosecution runs aground on the government's decision to charge and penalize him for only the violation of the Travel Ban and not for the Medicine Restrictions violation."[71]

The Ninth Circuit acknowledged that the agency's penalty notice "described [Mr. Sacks's] prior admission ambiguously" and that the penalty notice was "confusing."[72] Nonetheless, without the benefit of facts that might bear on

---

[68] Order at 5.
[69] *Id.* at 7.
[70] 466 F.3d 764, 2006 U.S. App. LEXIS 25294, at *21.
[71] *Id.* at *21-*22.
[72] *Id.* at *11 & *17.

the agency's intent, the court made the factual determination – on a rule 12(b)(6) motion – that "Sacks was not penalized for violating the Medicine Restrictions"[73] and that the agency decided "to charge and penalize him for only the violation of the Travel Ban and not for the Medicine Restrictions violation ... when it was fully aware he had also violated the Medicine Restrictions."

Based on these factual findings, the Ninth Circuit concluded that Mr. Sacks had not demonstrated an actual injury. Going further, the court concluded that Mr. Sacks could not even demonstrate a threat of future injury. In the Ninth Circuit's eyes, the agency's conduct "indicate[d] that the government does **not** intend to penalize him for any of his numerous violations of the Medicine Restrictions."[74] The court next went entirely outside the confines of the complaint, found that the agency had failed to pursue additional fines against Mr. Sacks, and concluded that this was "a strong indication of its lack of intent to do so in the future."[75] The court also deemed insignificant the agency's pursuit of fines against Voices, and its reservation of its right to impose additional penalties on Mr. Sacks.

Mr. Sacks now petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case raises important issues regarding the scope of executive power to punish U.S. citizens in violation of Congressional statutes and international law. If left uncorrected, moreover, individuals threatened with punishment for voicing their opposition to illegal conduct by the executive or acting for humanitarian purposes could lose the right to judicial review of the penalty's validity through tactically worded penalty notices. As set forth in the following sections, the case also presents a unique

---

[73] *Id.* at *18.

[74] *Id.* at *22-*23 (emphasis in original).

[75] *Id.* at *24.

opportunity to address these issues without undue interference with ongoing foreign policy initiatives of the executive branch.

I. The Ninth Circuit's Erroneous Ruling on Standing Will Prevent Judicial Scrutiny of Regulations like Those at Issue Here

The Ninth Circuit narrowly construed this Court's standing jurisprudence in order to deny Mr. Sacks' standing to challenge the agency's restriction on humanitarian donations of food and medicine (while recognizing his standing to challenge the travel ban). By doing so, the Ninth Circuit has done more than simply depart from established law. Rather, under the Ninth Circuit's ruling, it is difficult to conceive how the agency's authority to directly restrict humanitarian donations of food and medicine could ever be subjected to review. Under the Ninth Circuit's analysis, the agency may indirectly preclude all humanitarian exports through a travel ban, perpetually rendering its restrictions on humanitarian exports unreviewable.

Not only that, the Ninth Circuit's ruling on Mr. Sacks's standing is wrong. Mr. Sacks has Article III standing to challenge the agency's restriction on medical exports if three elements are present: (1) injury in fact to Mr. Sacks; (2) causation, i.e., a fairly traceable connection between Mr. Sacks' injury and the agency's restriction on medical exports; and (3) redressability, i.e., a likelihood that the relief Mr. Sacks requests will redress the injuries he alleges.[76]

At this stage of the proceedings, a motion directed to the pleadings, general factual allegations in support of standing are sufficient.[77] And when standing is challenged

---

[76] *E.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[77] *Steel Co.*, 523 U.S. at 105; *Lujan*, 504 U.S. at 561.

on the basis of the pleadings, the court must "accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party."[78]

As will be seen, the Ninth Circuit failed to apply these rules. Instead, it construed the complaint against Mr. Sacks, looked to facts outside the complaint, including facts that took place after the complaint was filed and, based on this review, concluded that Mr. Sacks lacked standing and that his claims were unripe.

A. Injury in Fact

A plaintiff has standing to challenge allegedly illegal action if he or she faces "some threatened or actual injury resulting from the putatively illegal action."[79] Here, Mr. Sacks faces both actual and threatened prosecution under the agency's medicine restriction.

Mr. Sacks was fined, the agency's penalty notice claimed, because he "admitted the [Prepenalty] Notice's allegation in Count 6 **that you exported goods to Iraq** absent prior OFAC approval."[80] This claim followed a prepenalty notice directed jointly to Voices and him (making clear that the agency did not view Mr. Sacks as any ordinary dues-paying member of that organization). The prepenalty notice claimed that "you and Voices in the Wilderness ('VW') have engaged in certain prohibited transactions"[81] which "**concern[ed] your and VW's exportation of donated goods, including medical supplies** and toys, to Iraq."[82]

---

[78] *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

[79] *E.g., Warth*, 422 U.S. at 490; *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *see also Heckler v. Mathews*, 465 U.S. 728, 736 (1984) ("actual or threatened injury" is required).

[80] Amended Complaint, Ex. 2, at 1 (emphasis added).

[81] Amended Complaint, Ex. 1, at 1.

[82] *Id.*

As previously mentioned, the Ninth Circuit dismissed the language of the penalty notice as ambiguous and "confusing." It then resolved the ambiguity against Mr. Sacks and concluded that Mr. Sacks had not been pursued or punished for exporting medical goods. But the court did not stop there. It went further and found that the agency's conduct did not suggest that the threat of future enforcement of the medicine restriction was anything more than conjectural.

These rulings do not comport with this Court's jurisprudence regarding standing. The complaint, construed in Mr. Sacks' favor, alleges that he was fined because he "exported goods to Iraq." The Ninth Circuit had no license to resolve factual issues on a Rule 12(b)(6) motion, which is precisely what it did when it found ambiguity in the penalty notice. A proper reading of the complaint reveals an actual injury in fact – a $10,000 civil penalty – imposed because he admitted that he "exported goods to Iraq." This satisfied the first prong of Article III's tripartite standing requirement.

The Ninth Circuit compounded its error by dismissing the threat of future prosecution as insufficiently concrete to satisfy Article III. But the combination of the agency's enforcement actions against Voices and Mr. Sacks plainly raises, at least on the pleadings, a credible threat of future prosecution. In *Babbitt v. United Farm Workers*[83], this Court articulated the difference between prosecutorial threats that are sufficient to confer standing and those that are not:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required

[83] 442 U.S. 289 (1979).

> to await and undergo a criminal prosecution as the sole means of seeking relief. But persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. When plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court.[84]

Here, as the Ninth Circuit acknowledged, Mr. Sacks had done more than merely assert an intention to engage in conduct that violated the medicine restriction. He has actually done so on several occasions. The question was therefore reduced to whether the threat of prosecution was something other than remote or speculative.

This Court has, from time to time, dismissed a threat of future prosecution as insufficient. In *Poe v. Ullman,*[85] this Court dismissed the threat of prosecution under a statute as insignificant where the statute had never been enforced in nearly a century (save for a single test case to establish its constitutionality and then not to the point that anyone was punished). In *O'Shea v. Littleton,* 414 U.S. 488 (1974), the threat of future abusive or discriminatory prosecution was dismissed where the plaintiffs did not allege any specific threats against them, where they did not challenge the validity of the any of the laws under which they might be prosecuted, and where the court "assume[d] that [plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by [defendants]." Here, of course, the regulations at issue are being enforced, and enforced against an association of

---

[84] 442 U.S. at 298-99 (citations and quotations omitted).
[85] 367 U.S. 497 (1961).

which Mr. Sacks is a member in connection with acts Mr. Sacks committed.

The threats Mr. Sacks faces are akin to those presented in *Doe v. Bolton*, 410 U.S. 179 (1973). There, the Court upheld the standing of physicians to challenge a law proscribing doctor assistance at most abortions where the statute was "recent and not moribund" and the Court was informed at oral argument that physicians had been prosecuted under it.

The threats here are certainly more concrete than those found to confer standing in *Pennell*. There, this Court ruled that an association of landlords had standing to challenge a rent control ordinance that limited their right to raise the rent where it would impose a hardship on the tenant and subjected landlords who violated the ordinance to civil and criminal penalties. It was enough, this Court ruled, that the complaint stated that the plaintiffs were "subject to the ordinance" and counsel stated, during oral argument, that most landlords had hardship tenants.[86]

Here, in contrast, the agency has assessed one civil penalty against Mr. Sacks because he admitted "exported goods to Iraq." It alleged – in a prepenalty notice sent to him as well as Voices – that "you and [Voices] engaged in certain prohibited transactions" including "your and [Voices'] exportation of donated goods, including medical supplies." Having identified Mr. Sacks as one of the individuals involved in this exportation, the agency sued Voices and pursued the claim to judgment. There is every reason to believe, on this record, that the agency intends to enforce its restriction on humanitarian donations and that Mr. Sacks is one of small handful of individuals in whom the agency is particularly interested in penalizing. The agency never disclaimed interest in doing so, warning the district court that it "reserve[d]he right" to "act[ ] in response to Plaintiff's eight other trips to Iraq."[87]

---

[86] *Pennell*, 485 U.S. at 7-8.

[87] Motion to Dismiss at 5, n.4.

Surely this was enough to move Mr. Sacks's claim past the pleading stage. To the extent there were doubts about the agency's enforcement philosophy, resolving those doubts on a motion to dismiss was improper. Factual questions regarding the agency's enforcements should have awaited discovery and development of the factual record.

In short, this Court's teaching in *Lujan v. Defenders of Wildlife* applies here:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.[88]

Here, Mr. Sacks himself has made humanitarian donations of medicine to civilians in Iraq, something the agency's regulations prohibit. The agency has accused him of exporting goods to Iraq and has fined him for admitting he did so. And it has reduced its claim against Voices to judgment, a claim that arises from the same conduct alleged in the prepenalty notice, conduct in which Mr. Sacks is alleged to have participated. For all these reasons, Mr. Sacks has alleged both a past injury as well as threatened future injuries. These satisfy the first element of standing.

B. Causation and Redressability

---

[88] *Lujan*, 504 U.S. at 561-62.

Before the Ninth Circuit, the agency did not contend that the second and third prongs of Article III standing were absent and the Ninth Circuit did not so rule.

Causation simply requires "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."[89] Here, the agency's own penalty and prepenalty notices trace the connection between the agency's restriction on medical exports and the pending civil penalty against Mr. Sacks. These notices demonstrate that the agency imposed the penalty because Mr. Sacks "exported goods to Iraq."

This Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[90] shows that courts may and should tolerate fairly attenuated causal chains, ones that might not satisfy traditional notions of causation under tort law. There, neighbors of a nuclear power plant under construction challenged the constitutionality of a statute that limited the liability of such plants. This Supreme Court found two injuries that conferred standing: thermal pollution of a nearby lake and non-natural radiation from the plant, neither of which was directly caused by the liability limitation at issue. Nor was the plaintiffs' alleged injury caused by the (alleged) illegal aspects of the defendant's behavior.[91] To the contrary, as a respected treatise notes, the plaintiffs' injuries arose from actions that were entirely lawful: the operation of a properly licensed generating plant.[92] But because the plant would not be built in the absence of a liability limitation, this Court concluded that the plaintiffs had satisfied the causation element of standing.

Redressability is likewise satisfied. It is fair to say that generally speaking, redressability only presents a problem where a third party, not the defendant, is the direct cause

---

[89] *Steel Co.*, 423 U.S. at 103 (citations omitted).

[90] 438 U.S. 59 (1978).

[91] CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.5, at 879 (2004 supp.

[92] *Id.*

of the plaintiff's injury.[93] In those instances, an order directed to the defendant may not redress the problem, because there is no guarantee that the third party will change its conduct in response to the order.[94] Here, of course, the agency, and not some third party, is the direct cause of Mr. Sacks's injury. An injunction prohibiting the agency from enforcing its regulatory prohibition against humanitarian exports of food and medicine would redress Mr. Sacks's injury.

Article III standing, therefore, was present. The Ninth Circuit should have proceeded to addresses the merits of Mr. Sacks's challenge to the medicine restriction, just as the district court did. Having done so, the Ninth Circuit should have reached a different conclusion than the district court, one that was not premised upon the determination that Geneva Convention "is not binding on the United States" and similar observations.[95]

II. A Prohibition on Humanitarian Donations Violates International Law That Congress Has Not Abrogated

The Ninth Circuit's ruling left unresolved the question of the executive's authority to punish U.S. citizens who try to relieve human suffering with humanitarian aid. The scope of the executive's power, especially in the face of clear and contrary legislation from Congress, is an important one worthy of this Court's consideration.

This case provides an excellent vehicle for addressing that issue because the Court may address the issue without

---

[93] *E.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (suit by unwed mother to force state to prosecute father who refused to pay child support); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) (suit by indigent persons challenging IRS elimination of requirement that hospitals provide services to indigents to extent of financial ability to qualify as charitable organization).

[94] *Id.*

[95] Order at 7.

concern for interference with either the political processes or ongoing foreign policy initiatives. This is so because the embargo on Iraq was lifted after the fall of the Saddam Hussein regime in 2003, without mooting the issues, since the executive reserves the right to punish past violations.[96]

As the district court noted below, the agency's embargo on Iraq is but one of over a dozen sets of regulations under which the agency has sought to restrict trade with foreign states.[97] Thus, issues concerning the proper use and scope of such restrictions are likely to recur. As the following sections show, the agency lacks the authority to impose the regulatory embargo that it did.

A. International Law Forbids the Deliberate, Mass Starvation of Children and Other Civilians

The prohibition against the deliberate starvation of civilian children is a peremptory norm, or "jus cogens," which means that it cannot be overruled by any other law or local custom.[98] The notion that a state may not intentionally target children and civilians during peacetime is not codified in a treaty. Rather, it is derived from treaty and international custom. Customary international law, like international law embodied treaties, is part of our law.[99]

---

[96] *See* Executive Order 13350, 69 Fed. Reg. 46055 (July 30, 2004).

[97] Order at 9-10.

[98] The concept of peremptory norms finds expression in a number of international legal sources. Among these is Article 53 of the Vienna Convention on the Law of Treaties, which declares void any treaty that "conflicts with a peremptory norm of general international law." Article 53 defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *done on* May 23, 1969, art. 53, 1155 U.N.T.S. 331.

[99] *The Paquete-Habana*, 175 U.S. 677, 700 (1900)

A number of international agreements evidence the international community's consensus that the intentional mass killing of civilians, especially children, is a crime. In the modern era, these begin with the 1948 Universal Declaration of Human Rights.[100] Article 25(1) of the Universal Declaration states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services ....

Article 25(2) provides that "[m]otherhood and childhood are entitled to special care and assistance." Civilized nations thus recognize that depriving people – particularly mothers, infants, and young children – of "food, clothing, housing and medical care and necessary social services" constitutes a deprivation of their human rights.

Although the Declaration itself does not have the force of a treaty under U.S. domestic law, it provides evidence of peremptory norms and customary international law, i.e., law that has not been codified in a treaty.

Moreover, many of the rights set forth in the Declaration were subsequently enshrined in other treaties. One is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[101] entered into force in 1956. Article 23 of the Geneva Convention states that even during war, parties to the treaty:

> shall allow the free passage of all consignments of medical and hospital stores ... intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children

---

[100] GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).

[101] Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

> under fifteen, expectant mothers and maternity cases.

Another is the Convention on the Prevention and Punishment of the Crime of Genocide,[102] which entered into force in 1951. This Convention, drafted in response to Nazi atrocities,[103] largely embodied the principles of law that were applied during the post-war Nuremberg trials. The Senate ratified the Convention in 1988. Article II of the Convention defines genocide to include killing or causing serious bodily or mental harm to members of a group as well as deliberately inflicting conditions of life calculated to bring about the partial or total physical destruction of the group.

Finally, Article 24 of the Convention on the Rights of the Child[104] "recognize[s] the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[105] The Convention states that nations "shall strive to ensure that no child is deprived of his or her right of access to such health care services." Accordingly, the Convention requires countries to:

> take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into

---

[102] Dec. 9, 1948, 78 U.N.T.S. 277.

[103] S. REP. NO. 99-2, pt. I, *reprinted in* 28 I.L.M. 754, 762 (1989).

[104] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

[105] *Id.*

consideration the dangers and risks of environmental pollution; [and] (d) To ensure appropriate pre-natal and post-natal health care for mothers.[106]

The United States admittedly has not ratified the Convention on the Rights of the Child (although not because it expressed an interest in exposing children to the hazards of international conflict). It has, however, ratified the "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict."[107] The preamble to that Protocol condemns "the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals."[108] The Protocol accordingly increases the strictures against the military recruitment of children.

These treaties and international documents embody or reflect certain principles of international law, most notably the principle is that one state may not carry out its foreign policy objectives vis-à-vis another state by intentionally targeting and killing the civilians, especially children, of the other state. Under the Supremacy Clause, these principles are the highest law of the land.[109]

In other sanctions-related contexts, Congress has enacted legislation that avoids conflict with these principles. Thus, the International Emergency Economic Powers Act ("IEEPA") § 203(b) contains the following restrictions on executive authority:

---

[106] *Id.*

[107] UNITED STATES DEPT. OF STATE, TREATIES IN FORCE (2006), at 389-90.

[108] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *done on* May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000).

[109] U.S. CONST. Art. 6.

> The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly --
>
> (2) donations ... of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering ... ; or
>
> (4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.[110]

Nonetheless, before the Court of Appeals, the agency contended that two statutes each abrogated these peremptory norms of international law and authorized its restrictions on humanitarian donations. This brings into play this Court's admonition, in an opinion by Chief Justice Marshall, that "a statute ought never to be construed to violate the law of nations, if any other possible construction remains."[111] Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[112] And "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[113]

---

[110] Section 203(b) of IEEPA is codified at 50 U.S.C. § 1702(b).

[111] *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32-33 (1982) (narrowly interpreting a federal statute in deference to an executive agreement between the United States and the Philippines); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (using a definition from an international treaty to interpret the Refuge Act of 1980); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

[112] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

[113] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring). This assumes, of course, that Congress has the

B. The UN Participation Act Does Not Authorize an Embargo on Humanitarian Aid

The first statute the agency cited to support its restriction on humanitarian aid was the UN Participation Act. That statute authorizes the executive branch to regulate trade with other countries when a UN Security Council resolution calls upon the United States to do so. Specifically, 22 U.S.C. § 287c(a) states that "whenever the United States is called upon by the Security Council to apply measures which said Council has decided ... are to be employed to give effect to its decisions ..., the president may, **to the extent necessary to apply such measures**, regulate or prohibit ... economic relations."[114] Thus, UN Participation Act only authorizes the agency to regulate or prohibit economic relations "to the extent necessary to apply" Security Council measures.

Here, the pertinent Security Council resolution is Resolution 661. But that resolution did not call for an embargo on medicine and medical supplies. To the contrary, it exempted "supplies intended strictly for medical purposes" and "payments exclusively for strictly medical or humanitarian purposes" from the embargo. Nor was the purpose of Resolution 661 unlimited. Its self-proclaimed goal was "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."[115] Nothing in the resolution purports to authorize an embargo until Saddam Hussein was removed from power. Because the UN Security Council **rejected** an

---

Constitutional authority to act, which it plainly does when it comes to embargoes on foreign countries. Article 8, section 3 of the federal Constitution gives Congress the power "To regulate Commerce with foreign Nations."

[114] 22 U.S.C. § 287c(a) (emphasis added).

[115] See, supra, note 6.

embargo on humanitarian supplies, the UNPA does not authorize the imposition of such an embargo.

Hence, the agency's medicine restriction falls to extent that it is applied to implement such an embargo. The same is true of the travel ban. While the President has the authority to limit international travel, he is bound by statutory limits.

C. The Iraq Sanctions Act of 1990 Does Not Authorize an Embargo on Humanitarian Aid

The agency also claimed that the Iraq Sanctions Act of 1990 "ratified" its regulations.[116] But the Act could not have ratified those regulations, since they were promulgated after the Act's November 5, 1990 passage.[117] The Act admittedly approved President Bush's earlier executive orders by name, but noted that these orders exempted humanitarian aid from their scope.[118] Perhaps most important, the Act required any regulations issued after it took effect to be submitted to Congress before taking effect.[119] The agency did not follow this Congressional directive. Nothing in the Act, therefore, can be read to approve the agency's regulations. This conclusion extends both to the medicine restriction and, to the extent employed to prevent humanitarian aid from reaching Iraq, the travel ban as well.

III. Conclusion

The agency has pursued Mr. Sacks for violating its restrictions on humanitarian aid to the people of Iraq. Mr. Sacks has standing to challenge the agency's restrictions.

---

[116] P.L. 101-513 *see* 50 U.S.C. § 1701 note.

[117] *See* 56 Fed. Reg. 2113 (Jan. 18, 1991).

[118] P.L. 101-513, § 586C(a) & (b).

[119] *Id.* § 586C(c)(1).

Those restrictions contravene the highest principles of the law of nations, principles Congress has never abrogated. Congress likewise has never authorized the agency's ban on humanitarian aid. For all these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Donald B. Scaramastra
Counsel of Record
Gary D. Swearingen
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, WA 98101-2939
(206) 464-3939

January 8, 2007

APPENDIX CONTENTS

Page

U.S. Court of Appeals Opinion (10/10/06) ..... 1 A

U.S. District Court Order (10/22/04) ..... 36 A

U.S. District Court Order Staying Discovery (8/31/04) ..... 51 A

United Nations Participation Act, 22 U.S.C. § 287c ..... 53 A

Iraq Sanctions Act, Pub. L. 101-513, § 586C ..... 54 A

Executive Order 12,722, 55 F.R. 31803 (Aug. 2, 1990), reprinted in 50 U.S.C. § 1701 note ..... 56 A

Executive Order 12,724 § 2(b), 55 F.R. 33089 (Aug. 9, 1990), reprinted in 50 U.S.C. § 1701 note ..... 59 A

31 CFR § 575.205 ..... 62 A

31 CFR § 575.207 ..... 63 A

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg., U.N. Doc. S/RES/661 (1990) ..... 64 A

Convention on the Prevention and Punishment Of the Crime of Genocide, 78 U.N.T.S. ..... 66 A

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 ..... 68 A

Page

Geneva Convention Relative to the Protection Of Civilian Persons in Time of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... 72 A

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948)..... 74 A

U.S. District Court Amended Complaint for Declaratory and Injunctive Relief (6/17/04) ..... 77 A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERTRAM SACKS, Plaintiff-Appellant, v. OFFICE OF FOREIGN ASSETS CONTROL, United States Department of the Treasury; RICHARD NEWCOMB, Director, Office of Foreign Assets Control, Defendants-Appellees.	No. 04-36136 D.C. No. CV-04-00108-JLR
BERTRAM SACKS, Plaintiff-Appellee, v. OFFICE OF FOREIGN ASSETS CONTROL, United States Department of the Treasury; RICHARD NEWCOMB, Director, Office of Foreign Assets Control, Defendants-Appellants.	No. 05-35001 D.C. No. CV-04-00108-JLR OPINION

SACKS V. OFFICE OF FOREIGN ASSETS CONTROL

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted
July 24, 2006-Seattle, Washington

Filed October 10, 2006

Before: 1. Clifford Wallace, Kim McLane Wardlaw, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wardlaw

COUNSEL

Donald B. Scaramastra (argued) and Gary D. Swearingen, Garvey Schubert Barer, Seattle, Washington, for appellant/cross-appellee Bertram Sacks.

SACKS V. OFFICE OF FOREIGN ASSETS CONTROL

H. Thomas Byron III (argued) and Douglas Letter, Department of Justice, Washington, DC, for appellees/crossappellants Office of Foreign Assets Control.

Kenneth S. Kagan, Carney Badley Spellman, P.S., Seattle, Washington, for amicus curiae Washington Physicians for Social Responsibility.

OPINION

WARDLAW, Circuit Judge:

These consolidated cross-appeals arise from a challenge to the pre-2003 United States sanctions prohibiting both travel to and the unlicensed donation of humanitarian medical supplies to Iraq. We affirm the district court's decision that Bertram Sacks has standing to challenge the ban on travel and that the travel ban regulation was validly promulgated. Sacks fails, however, to demonstrate a concrete and imminent likelihood that he will be penalized for violations of the restriction on medical donations. Therefore, his challenge to the restriction on medical donations does not fulfill the constitutional requirements of standing and ripeness. We also affirm the district court's holding that the Office of Foreign Assets Control (OFAC) regulation in effect at the time prohibited the government from referring Sacks's unpaid penalty to a private collection agency.

I. BACKGROUND

Bertram Sacks traveled to Iraq nine times between 1990 and 2003 in violation of sanctions the United States imposed against Iraq following the 1990 invasion of Kuwait. According to Sacks's Amended Complaint, the

twelve years of United States and United Nations sanctions were a dire time for Iraqi civilians, marked by malnutrition, high rates of infant and child mortality, and shortages of medicine.[1] Sacks, and an advocacy group called Voices in the Wilderness (Voices), opposed these sanctions on humanitarian grounds. In an effort to draw attention to the effect of the sanctions, Sacks and other Voices members traveled to Iraq repeatedly while the sanctions were in effect, bringing with them medicine and medical supplies for which they had failed to procure an export license. They did so in knowing violation of the United States regulations prohibiting travel and the sending of unlicensed humanitarian donations to Iraq.

---

[1] In support of his claims, Sacks cites, among other documents, the following sources: UNICEF, The Situation of Children in Iraq 20 (2003), available at http://www.unicef.org/publications/index_4439.html(reviewing data on increased infant and child mortality during the sanctions regime period and concluding that "most of the children who are dying in Iraq are dying from preventable illness"); UNICEF, Iraq's Children: A Lost Generation 3 (2001), available at http://www.scn.org/ccpi/Uniceflvfay200l.html ("Mounting evidence shows that the sanctions are having a devastating humanitarian impact on Iraq."); Marc Bossuyt, U.N. Econ. & Soc. Council, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights ~~ 63-67 (June 21, 2000), available at http://www.globalpolicy.org/security/sanction/unreports/bossuyt.htm ("[T]he sanctions upon Iraq have produced a humanitarian disaster comparable to the worst catastrophes of the past decades. . . . Owing to the lack of medical supplies, it was estimated that, by 1997, 30 per cent of hospital beds were out of use, 75 per cent of all hospital equipment did not work and 25 per cent of Iraq's 1,305 health centres were closed.").

Sacks has been assessed a penalty by the federal government for one violation arising from these trips, and he seeks relief from enforcement of that penalty.

A. Iraqi Sanctions

To place this case in context, it is necessary to review the history of the Iraqi sanctions regime. On August 2, 1990, one day after Saddam Hussein's armies invaded Kuwait, President George H.W. Bush issued Executive Order 12,722, which declared a national emergency and imposed sweeping prohibitions on numerous economic and social transactions with Iraq. 55 Fed. Reg. 31,803 (Aug. 2, 1990). Four days later, the United Nations Security Council passed Resolution 661, which called on all Member States to prevent their nationals from engaging in economic and financial transactions with Iraq except for humanitarian donations of food and medical supplies. Prohibited activities included:

> (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait. . . and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;

S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990). Following passage of this resolution, President Bush

replaced the earlier Executive Order with Executive Order 12,724, a more thorough and detailed set of sanctions, which likewise included an exception for humanitarian donations of food and medicine. It prohibited, among other things:

> (b) The exportation to Iraq . . . , directly or indirectly, of any goods, technology. . . or services either (i) from the United States, or (ii) requiring the issuance of a license by a Federal agency, or any activity that promotes or is intended to promote such exportation, except donations of articles intended to relieve human suffering, such as food and supplies intended strictly for medical purposes;
>
> (d) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Iraq, or to activities by any such person within Iraq, after the date of this order, other than transactions necessary to effect (i) such person's departure from Iraq, (ii) travel and activities for the conduct of the official business of the Federal Government or the United Nations, or (iii) travel for journalistic activity by persons regularly employed in such capacity by a news-gathering organization;

55 Fed. Reg. 33,089, 33,089 (Aug. 9, 1990). For the President's authority to impose these sanctions, Executive Order 12,724 relied upon the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*, and the United Nations Participation Act, 22 U.S.C.

§ 287c. 55 Fed. Reg. at 33,089. The Executive Order also made clear that the sanctions described therein could be modified or limited by future regulation, and authorized the Treasury Secretary to promulgate whatever regulations were necessary to carry out its proscriptions. *Id.*

A month after its initial resolution on Iraq, the United Nations Security Council became concerned that the Iraqi government was diverting donated humanitarian food and medical supplies to its military. U.N. SCOR, 4th Sess., 2939th mtg. at 12-13, 19,25, U.N. Doc. S/PV.2939 (Sept. 13, 1990). It therefore passed a new resolution recommending, among other steps to be taken, "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666, ¶ 8, U.N. Doc. S/RES/666 (Sept. 13, 1990). When the United States Congress engaged the issue that November, it authorized the President to continue the embargo and sanctions embodied in Executive Order 12,724, but also required that transactions involving "foodstuffs . . .exempted 'in humanitarian circumstances'" be conducted pursuant to the later Security Council Resolution, Resolution 666. Iraq Sanctions Act of 1990, Pub. L. No. 101-513, 104 Stat. 1979, 2048 (1990).

In January 1991, OFAC, an agency within the Department of Treasury responsible for coordinating international sanctions, published a final rule in the Federal Register establishing the Iraqi Sanctions Regulations (the Iraqi Sanctions). 56 Fed. Reg. 2112-01 (Jan. 18, 1991) (codified at 31 C.F.R. §§ 575.101 *et seq.*). These regulations included the two at issue here: 31 C.F.R. § 575.207, which prohibited all United States persons from conducting "any transaction relating to travel by any U.S. citizen or permanent resident alien to

Iraq, or to activities. . . within Iraq," except for journalists, United States or United Nations officials, and those assisting American citizens or permanent residents to flee Iraq (the Travel Ban); and 31 C.F.R. § 575.205, which banned the export of goods, services, and technology to Iraq but retained an exception for "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has been specifically licensed" (the Medicine Restrictions). OFAC also established a licensing program to enable humanitarian donations of food and medical supplies, *id.* §§ 575.501, 575.520, 575.521, *repealed by* 68 Fed. Reg. 61,362, 61,363 (Oct. 28, 2003), and a process for assessing penalties against those who violated the sanctions, *id.* §§ 575.701-705. The Iraqi Sanctions remained in place until, soon after the American-led invasion of Iraq in 2003, the United Nations lifted all non-weapons trade restrictions against Iraq, S.c. Res. 1483, '110, U.N. Doc. S/RES/1483 (May 22, 2003), and OFAC issued a general license permitting all Iraq-related transactions that previously had been prohibited, including unlicensed humanitarian donations, 68 Fed. Reg. 38,188, 38,189 (June 27, 2003) (codified at 31 C.F.R. § 575.533).

B. Assessment of the Penalty

Following a highly-publicized November 1997 humanitarian trip to Iraq in which Sacks participated, OFAC issued Sacks a Prepenalty Notice, pursuant to 31 C.F.R. § 575.702. The Prepenalty Notice accused Sacks, other individuals, and Voices of violating the Iraqi Sanctions.[2] In its Violations section, the Prepenalty

[2] It appears from the record that a single Prepenalty Notice was issued to Sacks and the other named

Notice described "your and [Voices]' exportation of donated goods, including medical supplies and toys, to Iraq absent specific prior authorization by OFAC." It then listed ten specific violations. Six of these violations accused Voices of exporting medical supplies and/or other goods "absent prior specific license or other authorization." Sacks was individually charged with only one violation:

> 6. Between on or about November 21-30, 1997, Messrs. Handleman, Mullins, Sacks and Zito engaged in currency travel-related transactions to/ from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals;

The Prepenalty Notice proposed a $10,000 penalty for Sacks and the other individuals described in the sixth charge, and a $120,000 penalty for Voices ($20,000 for each of the six violations). It further provided Sacks an opportunity to respond to the charges in writing, which he *did*. Although he was individually charged only with violating the Travel Ban, in his written response Sacks admitted that he had violated the Medicine Restrictions, as well as the Travel Ban, stating, "You are correct to say in your prepenalty letter (12/3/98) that I brought medical supplies and toys to Iraq absent prior OFAC approval." Although he did not explicitly address the travel charge, the statement that he "brought medical supplies and toys to Iraq" is an implied admission that he had traveled to Iraq.

---

individuals. Presumably, a separate Prepenalty Notice was issued to Voices.

Three-and-a-half years later, OFAC issued Sacks a formal Penalty Notice, which described his prior admission ambiguously: "You admitted the Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval." Citing his willful violation of the Iraqi Sanctions, OFAC imposed the full $10,000 penalty against him and demanded that it be paid within thirty days. When Sacks did not pay the penalty, he received a letter in August 2003 from the Ocwen Federal Bank, which sought to collect the debt - $13,767.08 including interest and late fees - on behalf of the United States Department of Treasury.

C. Procedural History

Seeking to prevent collection of the penalty, Sacks brought suit in the United States District Court for the Western District of Washington against OFAC and its director, Richard Newcomb (collectively, OFAC). He sought declaratory and injunctive relief on the theory that the Medicine Restrictions and the Travel Ban lacked statutory authority and violated principles of international law. Sacks also alleged that OFAC's claims against him were time-barred. The district court granted OFAC's motion to dismiss, holding that the Travel Ban was validly promulgated and enforceable; that, regardless of whether Sacks had standing to challenge the Medicine Restrictions, they too were validly promulgated; that international law did not render these regulations unconstitutional; and that enforcement of the penalty was not timebarred. However, the court held that OFAC was prohibited by its own regulations from referring the unpaid penalty to a collection agency.

Sacks appeals the district court's dismissal only on the ground that the two regulations were invalidly

promulgated.[3]

OFAC cross-appeals the district court's determination that it could not use an outside collection agency to collect the penalty and was required to refer the penalty to the Department of Justice for collection in a federal civil suit. We have jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291, and we now affirm.

II. STANDARD OF REVIEW

We review de novo a district court's grant of a defendant's motion to dismiss. *See Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). Standing is a question of law reviewed de novo, *see S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461,474 (9th Cir. 2001), as are challenges that an agency's regulations exceed its statutory authority, *see Perez-Martin v. Ashcroft*, 394 F.3d 752, 757 (9th Cir. 2005). On cross-appeal, we review the district court's interpretation of OFAC's enforcement regulation de novo, according deference to OFAC's interpretation of its own regulations so long as that interpretation is not plainly erroneous or inconsistent with the regulation. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

---

[3] Sacks does not appeal the district court's ruling that enforcement of the penalty is not time-barred. Sacks disclaims on appeal the argument that international law forbids the President from placing limits on humanitarian medical donations. Instead, he posits that the international treaties and conventions he cites were background principles that Congress intended to codify when it limited the President's emergency authority in the International Emergency Economic Powers Act of 1977. We discuss this argument below.

III. STANDING

[1] Sacks challenges two provisions within the Iraqi Sanctions: the Travel Ban and the Medical Restrictions. We must first determine whether he has standing to assert these claims. "[S]tanding is a threshold question which we must resolve before proceeding to the merits." *Los Angeles County Bar Ass 'n v. Eu*, 979 F.2d 697, 700 (9th Cir. 1992). This principle is grounded in the "case or controversy" requirement of Article III of the United States Constitution: If Sacks suffered no injury-in-fact caused by the Travel Ban or Medicine Restrictions themselves, then any opinion we render on that provision would be merely advisory. *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 654 (9th Cir. 2002).

The requirements of Article III standing are well established:

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
> (2) the injury is fairly traceable to the challenged action of the defendant; and
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Article III standing requires the plaintiff to establish standing for each challenge he wishes to bring and each form of relief he seeks. *See id.* To survive a Rule 12(b)(6) motion to dismiss, Sacks must allege facts in his Amended Complaint that, if proven, would confer standing upon

him. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that, at this stage, "general factual allegations of injury resulting from the defendant's conduct may suffice"). Therefore, we must determine whether Sacks's Amended Complaint identifies an injury caused by each of the two regulations that is both concrete and actual or imminent.

A. Travel Ban

[2] Sacks has standing to challenge the Travel Ban and the government does not contend otherwise. The Prepenalty Notice that explained the charge against him explicitly mentioned his violation of the prohibition on travel to and currency-related travel transactions within Iraq. Where the "plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. The government, through the Ocwen Federal Bank, now seeks to collect a civil penalty from Sacks for violating the Travel Ban. A civil fine is a pecuniary injury, and "[pecuniary injury is clearly a sufficient basis for standing." *Cent. Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993) (internal quotation marks omitted).

B. Medicine Restrictions

[3] Sacks challenges only the facial validity of the restrictions on unlicensed medical donations, and not the application of the licensing regime. Sacks concedes that he did not apply for an OFAC license to donate humanitarian medical supplies to Iraq, as 31 C.F.R. § 575.521 allowed. We clarified in *United States v. Hugs* that a plaintiff s failure to apply for an available permit precludes him from challenging the operation of the permitting scheme but not the facial validity of the statute or regulations. 109 F .3d 13 75, 13 78 (9th Cir. 1997). Sacks therefore lacks standing to challenge the operation of the licensing regime but is not prohibited under *Hugs* from facially challenging the Medicine Restrictions.

Sacks cites three reasons why he satisfies the injury-in-fact requirement as to the Medicine Restrictions: (1) he has been actually punished for violating the Medicine Restrictions; (2) he will be called upon to pay the penalties assessed against Voices; and (3) he legitimately fears future prosecution for openly violating the Medicine Restrictions. We find none of these to be persuasive.

[4] Sacks contends that his 2003 penalty was assessed for violation of the Medicine Restrictions. We disagree. OFAC's treatment of Sacks indicates its belief that penalties were assessed only for the Travel Ban violation. The Penalty Notice, while confusing, expressly references "Count 6" of the earlier Notice, which referred only to the Travel Ban. Moreover, it was reasonable for OFAC to treat Sacks's admission that he "brought" medical supplies to Iraq as an admission that he traveled to Iraq. As Sacks concedes, bringing medical supplies to Iraq can be accomplished only by traveling to that country to deliver them. Finally, the $10,000 penalty ultimately levied against Sacks was consistent with those proposed in the Penalty Notice for violating the Travel Ban; in contrast, the proposed penalties for violating the Medicine Restrictions were $20,000 per violation. Therefore, we conclude that Sacks was not penalized for violating the Medicine Restrictions.

[5] Nor does Sacks's status as a member of Voices expose him to liability for the penalties assessed against the organization so as to confer standing. Sacks does not suggest that he has third-party standing to challenge the Medicine Restrictions on Voices's behalf; indeed, Voices has already challenged the penalties assessed against it. *See Office of Foreign Assets Control v. Voices* in the Wilderness, 329 F. Supp. 2d 71 (D.D.C. 2004). More importantly, nothing in the Amended Complaint or in the record indicates that Sacks has any financial

responsibility for Voices's fine; that action against him has been initiated or is imminent; or even that OFAC has ever turned to individual group members of an unincorporated organization to collect civil fines against the organization. Therefore, Sacks's mere membership in a penalized organization does not create a " 'realistic danger of [his] sustaining a direct injury as a result of the statute's operation or enforcement.' " *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

[6] Finally, Sacks does not face imminent, or even likely, prosecution for violating the Medicine Restrictions. It is true that the Executive Order terminating the "national emergency" in Iraq explicitly reserved the government's right to bring proceedings based on acts in violation of the sanctions committed before the sanctions expired. Exec. Order No. 13,350, 69 Fed. Reg. 46,055,46,055 (July 29, 2004). Therefore, Sacks theoretically may be subject to penalties for taking medicine to Iraq, even though the United States has allowed humanitarian medical donations to Iraq since May 2003.

However, while it is well-established that an individual need not await prosecution under a law or regulation before challenging it, see Babbitt, 442 U.S. at 298; *Canatella v. California*, 304 F.3d 843, 852 (9th Cir. 2002) (as amended), we require a "genuine threat of imminent prosecution" and not merely an "imaginary or speculative fear of prosecution." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation marks omitted).

The requirement that a fear of prosecution be fairly certain to confer standing on the plaintiff is informed by

the same considerations as the doctrine of ripeness. The ripeness requirement aims to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Caifano v. Sanders*, 430 U.S. 99 (1977). As we have previously observed, "the constitutional component of the ripeness inquiry. . . , in many cases, . . . coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Therefore, we employ the same test to determine if a plaintiff has established standing based on a fear of prosecution that we use to determine if a case or controversy is sufficiently ripe.

> In evaluating the genuineness of a claimed threat of prosecution, we look to whether the plaintiffs have articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.

See id. at 1139 (citing *San Diego County Gun Rights Comm.* 98 F.3d at 1126-27). Whether viewed through the lens of standing or ripeness, Sacks's challenge to the Medicine Restrictions is not justiciable.

Sacks has established two of the requisite elements required to survive the motion to dismiss on standing or ripeness grounds. He had more than a "concrete plan" to violate the Medicine Restrictions; he admits that he actually did violate them on a number of occasions. *See Jacobus v. Alaska*, 338 F.3d 1095, 1105 (9th Cir. 2003).

He also alleges that OFAC has historically targeted other alleged violators of the Medicine Restrictions, including Voices. Because, on review of a district court's Rule 12(b)(6) dismissal, we assume all facts alleged in the Amended Complaint are true, *see Bassidji v. Goe*, 413 F.3d 928, 930 (9th Cir. 2005), these allegations are sufficient to satisfy the first two elements.

Sacks's fear of prosecution runs aground on the government's decision to charge and penalize him for only the violation of the Travel Ban and not for the Medicine Restrictions violation. In *Jacobus v. Alaska*, we similarly confronted a plaintiff who feared future prosecution under a repealed statute. The plaintiffs in *Jacobus* had knowingly violated Alaska campaign finance laws capping contributions to political parties and volunteer professional services to campaigns. 338 F.3d at 1101 the wake of a district court ruling against the state, the Alaska legislature revised its campaign finance laws to remove the offending provisions, but the state continued to argue their legality on appeal. The Alaska Public Offices Commission (APOC) then wrote Jacobus indicating that "if the law were upheld it reserved the right to prosecute any past violations" he had committed, "although it would not pursue any enforcement action during the pendency of the litigation." *Id.* at 1104. We held that Jacobus faced a genuine threat of imminent prosecution because even though "the letter sent to Jacobus does not threaten to initiate enforcement proceedings in so many words, it indicates that APOC is only awaiting the outcome of the litigation to initiate such proceedings." *Id.* at 1105.

Sacks is in a materially different position than the *Jacobus* plaintiffs. Contrary to Sacks's contention, the government's decision to penalize him for only the Travel Ban violation, when it was fully aware he had also

violated the Medicine Restrictions, indicates that the government does *not* intend to penalize him for any of his numerous violations of the Medicine Restrictions. OFAC has not taken the step it normally would take to express its intent to penalize Sacks and thus preserve its right to do so, by sending him a prepenalty notice. The Amended Complaint is devoid of any allegations suggesting that OFAC has communicated an intent to punish him further.

[7] To demonstrate the requisite "specific warning or threat to initiate proceedings," *Thomas*, 220 F.3d at 1139, Sacks points only to a footnote in OFAC's Motion to Dismiss that reads: "Although OFAC has not yet acted in response to Plaintiffs eight other trips to Iraq, it reserves the right to do so in the future." While this language is similar to the language used by the agency in *Jacobus*, that alone does not demonstrate that prosecution is imminent. First and foremost, unlike the agency in *Jacobus*, which could not bring charges against the plaintiff because the relevant law had been declared unconstitutional by the district court, nothing has prevented OFAC from charging Sacks under the Medicine Restrictions over the last decade. OFAC's declination to charge him for the Medicine Restrictions violations during the last eight years, therefore, is a strong indication of its lack of intent to do so in the future. Furthermore, the footnote Sacks relies on to demonstrate the threat of prosecution does not mention the Medicine Restrictions at all, but rather references his violation for engaging in travel-related transactions. Therefore, Sacks has failed to demonstrate any specific threat of prosecution for violations of the Medicine Restrictions. *See Friends of the Earth*, 528 U.S. at 180 (noting that Article III requires plaintiffs injury to be "actual or imminent, not conjectural or hypothetical").

Moreover, it is not clear from the Amended Complaint that OFAC could still bring charges against Sacks for violating the Medicine Restrictions. The relevant statute of limitations for the government to bring proceedings enforcing a civil penalty is five years from the date of the act. *See* 28 U.S.C. § 2462. A plaintiff's standing is evaluated as of the date the complaint was filed, in this case January 14, 2004. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). The Amended Complaint does not allege that Sacks violated the Medicine Restrictions after January 14, 1999. The alleged violations are thus likely time-barred, diminishing any threat of prosecution that would have supported standing at the outset of this suit. Moreover, even if Sacks had more recently violated the Medicine Restrictions, it is quite possible that the statute of limitations on those violations has also passed, rendering his fears of prosecution moot. *See Jacobus*, 338 F.3d at 1102 (noting that mootness may warrant dismissal where it is" 'absolutely clear that the litigant no longer ha[s] any need of the judicial protection' " he seeks (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000))).

[8] Because Sacks fails to allege a concrete and imminent injury-in-fact caused by the Medicine Restrictions, this claim is not justiciable both for lack of standing and ripeness. Of course, should OFAC take action to penalize Sacks for violating the Medicine Restrictions at a later date, he would then have standing to challenge their legitimacy. We therefore do not reach Sacks's challenge to the district court's ruling that the Medicine Restrictions were validly promulgated. *See Mustang Marketing, Inc. v. Chevron Products Co.*, 406 F.3d 600, 606 (9th Cir. 2005) ("Our review is not limited to a consideration of the grounds upon which the district court decided the issues; the Court can affirm the district

court on any grounds supported by the record.").

IV. VALIDITY OF THE TRAVEL BAN

Sacks does not challenge OFAC's basic authority to restrict travel to Iraq at the President's direction under the United Nations Participation Act (UNPA). *See* 22 U.S.C. § 287c(a) (allowing the President to prohibit rail, sea, and air "communication" with another country in order to comply with United Nations directives); *Karpova v. Snow*, 402 F. Supp. 2d 459, 469 (S.D.N.Y. 2005) (holding that the Iraq Travel Ban is duly authorized by the UNPA). Instead, he alleges that the Travel Ban regulation, 31 C.F.R. § 575.207, exceeded the President's statutory authority because it indirectly regulated the donation of humanitarian medical supplies, something Sacks contends the International Emergency Economic Powers Act (IEEPA) forbids the President from doing. Because the IEEPA imposes no such burden on the President's powers when he acts under the UNPA, we reject this argument.

[9] The IEEPA grants the President authority to unilaterally impose regulations on economic transactions between the United States or its nationals, and foreign countries or their nationals. 50 U.S.C. § 1702(a)(1). To trigger this authority, the President must declare a "national emergency" necessitated by an "unusual and extraordinary threat." *Id.* § 1701. However, the President's power under the IEEPA is constrained: It "does not include the authority to regulate or prohibit, directly or indirectly. . . donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing and medicine, intended to be used to relieve human suffering," unless the President determines that such donations would seriously impair his ability to address the emergency or would endanger

the safety of American combat forces engaged in hostilities. *Id.* § 1702(b)(2). The President, acting under the IEEPA, is also precluded from regulating the export of postal, telegraphic, telephonic and personal communications; information or informational materials, including magazines, photographs, and artwork; and travel to or from a country. *Id.* § 1702(b).

As the district court recognized, however, the IEEPA is not the lone source of the President's power to enact economic sanctions. Executive Order 12,724, which instructed the Treasury Secretary or his designate (OFAC) to promulgate regulations enforcing the economic sanctions against Iraq, derived its power from both the IEEPA and the UNPA. 55 Fed. Reg. 33,089 (Aug. 9, 1990). OFAC contends that Congress did not intend the IEEPA's limits to interfere with the President's authority under the UNP . Our review of the structure and plain language of the two statutes convinces us that OFAC is correct.

[10] The economic restrictions authorized by the IEEPA (and the related limits on that authority) are confined to a particular circumstance: the declared national emergency. See 50 U.S.C. § 1701(b) ("The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . . "); *id.* § 1702(b) ("The authority granted to the President *by this section* does not include the authority to regulate [humanitarian aid, travel, etc.]." (emphasis added)). The IEEPA also requires the president to consult with Congress before acting, and to regularly consult and report to Congress after exercising his authority. *Id.* § 1703. By contrast, the UNPA allows the President to impose sanctions that are more wide-ranging, without

any built-in congressional review and "[n]otwithstanding the provisions of any other law." 22 U.S.C. § 287c. When called upon to enforce a Security Council directive, the UNPA authorizes the President:

> to the extent necessary to apply such measures . . . [to] investigate, regulate or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio and other means of communication between any foreign country or national thereof. . .and the United States or any person subject to the jurisdiction thereof.

Id. The UNPA thus authorizes the President to take measures when enforcing a Security Council resolution, such as limiting postal communication and air travel, that he could not take independently by declaring a national emergency. Sacks's proposed interpretation would treat Congress's passage of the IEEPA in 1977 as a partial sub silentio repeal of the UNPA. Weare reluctant to conclude that a statute has been repealed without a clear statement from Congress: "[E]ven when two statutes are in some conflict, repeal is to be regarded as implied only if necessary to make the latter enacted law work, and even then, only to the minimum extent necessary." *Lujan Armendariz v. INS*, 222 F.3d 728, 744 (9th Cir. 2000) (internal quotation marks and brackets omitted).

[11] We refuse to read Congress's passage of the IEEPA as repealing key provisions of the UNPA. Proper functioning of the IEEPA does not depend on a repealing of the UNPA, since the two statutes authorize presidential actions in unique, albeit sometimes overlapping, situations. Reading the statutes to avoid a

conflict maintains the complete viability of both statutes and is most faithful to Congress's plain language.

The legislative history of the IEEPA and the UNPA supports our view. The IEEPA was passed by Congress to counter the perceived abuse of emergency controls by presidents to unilaterally sanction foreign governments or interfere with international trade in non-emergency, peacetime situations. The Senate Committee Repcrt explains:

> The bill is a response to two developments: first, extensive use by Presidents of emergency authority under section 5(b) of the Trading with the Enemy Act of 1917 to regulate both domestic and international economic transactions unrelated to a declared state of emergency, and second, passage of the National Emergencies Act of 1977 which provides safeguards for the role of Congress in declaring and terminating national emergencies . . . .

S. Rep. No. 95-466, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. The Senate Report then describes the four national emergencies that were in effect in 1976, two of which had been in place for more than twenty-five years. *Id.* at 4541-42.

[12] By contrast, the Senate Report accompanying passage of the UNPA acknowledged that the statute granted extraordinary powers to the President to enforce United Nations sanctions as quickly as possible, but stated the Committee's belief that such powers were necessary to fulfill the United States's obligations under the United Nations Charter and make international

sanctions effective. As the House Report states,

> The committee realizes that the powers proposed to be granted to the President under this section are very great. However, the basic decision in this regard was made when the Charter was ratified and this provision is simply a necessary corollary to our membership in this Organization [the U.N.]. The committee also believes that the Security Council must be placed in the most effective position possible to act under article 41 since the prompt and effective application of economic and diplomatic sanctions by all the United Nations (or even the threat or possibility thereof) may avoid the necessity for the use of the armed forces available to the Security Council.
>
> The better prepared this country is to participate promptly in action of this kind, the more effective will be the Security Council and the more hope there will be that the United Nations may serve its major purpose, namely, the prevention of armed conflict.

U.S. Code Congo Serv., 79th Cong., p. 932 (1945). This legislative history confirms what the plain text of the statute indicates: that the IEEPA significantly restricted the President's emergency authority but did not intend to alter the President's" very great" powers to impose economic sanctions enforcing a United Nations resolution.

Nor does the IEEPA's legislative history indicate, as

Sacks contends, that the statute was intended to codify and make binding international law principles on humanitarian relief that had emerged since the passage of the UNPA thirty years earlier. Neither the IEEPA nor its legislative history mentions international law or a universal right to medical supplies. Congress's only indication of its intent in exempting medical supplies from the President's emergency powers is a statement in the Senate Report that the exemption would "enable U.S. persons to make humanitarian contributions in accordance with their conscience." S. Rep. No. 95-466, 1977 U.S.C.C.A.N. at 4544. Sacks's claim of congressional intent is further belied by the IEEPA provision allowing the President to unilaterally regulate, or even prohibit, humanitarian medical supplies simply by declaring that doing so is necessary to address the declared national emergency, as President George W. Bush did when he prohibited the export of humanitarian supplies to al-Qaeda and other terrorist entities following the September 11, 2001 terrorist attacks. *See* Exec. Order No. 13,224,66 Fed. Reg. 49,079, 49,080-81 (Sept. 23, 2001).

[13] Therefore, the district court correctly held that the medical supplies exception to presidential power embodied in the IEEPA did not limit the President's ability to ban travel to and within Iraq pursuant to the UNPA.[4]

V. USE OF COLLECTION AGENCY

[4] Because we conclude that the IEEPA provisions do not restrict the President's authority under the UNPA, we do not reach OFAC's argument that the Travel Ban is not an indirect regulation of humanitarian medical donations.

In its cross-appeal, OFAC asks us to vacate the district court's injunction prohibiting OFAC's use of the Ocwen Federal Bank to collect Sacks's unpaid penalty. Because the OFAC regulation in effect when Sacks's penalty was assessed clearly required referral exclusively to the United States Department of Justice for collection in a federal civil suit, we affirm the district court's issuance of the injunction.

Neither Executive Order 12,724 nor the Iraq Sanctions Act specified the method by which penalties should be imposed or collected, effectively leaving that gap to be filled by OFAC, the agency to which the President delegated his regulatory powers over the Iraqi Sanctions. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). OFAC promulgated regulations for the collection of unpaid penalties under the Iraqi Sanctions. In relevant part, they read:

> In the event that the person named does not pay the penalty imposed pursuant to this subpart or make payment arrangements acceptable to the Director within 30 days of the mailing of the written notice of the imposition of the penalty, the matter shall be referred to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court.

31 C.F.R. § 575.705 (2002). OFAC claims that this provision also allowed it to use administrative collection

efforts, including outside collection agencies, to obtain unpaid penalties.

Where an agency offers an interpretation of its own regulations in federal court, we must give "substantial deference" to that interpretation "unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). We will defer to the agency's interpretation of its own regulation, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Rendleman v. Shalala*, 21 F.3d 957, 961 (9th Cir. 1994).

[14] Here, the agency's command is absolute: if the penalty is unpaid after thirty days, "the matter shall be referred to the [Justice Department] for appropriate action to recover the penalty in a civil suit." Following the guidance of the Supreme Court, *see, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001) (explaining the difference between Congress's use of the "permissive 'may' " and its "use of a mandatory 'shall' "), we have previously made clear that Congress's or an agency's use of the word "shall" indicates a mandatory duty that is not subject to discretion. For example, in *Center for Biological Diversity v. United States Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003), we held that a Council on Environmental Quality regulation stating that an agency "shall" discuss opposing viewpoints and its response to them in a final environmental impact statement could not be satisfied merely by including and analyzing a more environmentally-restrictive alternative to the proposed plan. Similarly, in *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (per curiam), we held that a Bureau of

Prisons regulation stating that wardens "shall identify" outdoor smoking areas left the warden no discretion but to do so. Although we will depart from the interpretation of "shall" as mandatory where a "convincing argument to the contrary is made," *Newman v. Chater*, 87 F.3d 358, 361 (9th Cir. 1996) (internal quotation marks omitted); *see also Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001), such occasions are rare. OFAC offers three reasons to support its contentions that we should disregard the plain language of the regulations. None of these is persuasive.

First, OFAC argues that all government agencies are authorized, and even encouraged, to utilize private collection agencies and other administrative collection efforts before referring cases to the Department of Justice. We do not disagree. For example, 31 U.S.C. § 3718(a) expressly authorizes federal agency heads to establish contracts with collection services to recover United States assets. Current Treasury Department regulations, codified in 2002, go even further, indicating that every unpaid debt should be referred for debt collection services, 31 C.F.R. § 5.9, that multiple collection remedies should be utilized, *id.* § 5.2, and even that "aggressive collection activity" should take place before referral to the Department of Justice, *id.* § 5.16. We may even accept, without deciding, OFAC's contention that it would not need to adopt an explicit regulation before utilizing administrative collection efforts. As the district court noted, however, what OFAC overlooks in emphasizing these general, permissive provisions is that the one provision that specifically addresses violations of the Iraqi Sanctions, 31 C.F.R. § 575.705, did not take advantage of OFAC's authority to permit the use of outside collection agencies and, in fact, made referral to the Justice Department mandatory. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 916

(9th Cir. 2005) (discussing the "basic principle of statutory construction. . . that the specific prevails over the general"). We do not know why the Iraqi Sanctions failed to provide for administrative collection efforts or the utilization of collection agencies. This omission may have reflected the due process concern that individuals might face harassment by aggressive nongovernmental collection agencies[5] for penalties of up to $250,000, without ever having had an opportunity to challenge their penalties before an Article III court. Regardless of the rationale for the regulation, there is nothing in the regulatory scheme or the President's Executive Order that would justify the abandonment of the general rules that the plain language of a regulation controls, and that "shall" indeed means "shall."

Second, OFAC points to its recent revision of section 575.705 as evidence of how the previous section 575.705

---

[5] The sanctions regulations established before the Iraqi Sanctions Regulations similarly mandated referral to the Department of Justice, and did not provide for other collection efforts. At some point in the 1990s, however, without the prompting of a court decision, OFAC began including language in its sanctions regulations that unpaid penalties shall be, or may be, "referred for administrative collection measures . . . or to the United States Department of Justice" for recovery in a civil suit. See, e.g., 58 Fed. Reg. 13,199, 13,212-13 (Mar. 10, 1993) (codified at 31 C.F.R. § 585.705) (Yugoslavian sanctions regulations); 60 Fed. Reg. 47,061,47,073 (Sept. 11, 1995) (codified at 31 C.F.R. § 560.706) (Iranian sanction regulations); 61 Fed. Reg. 3805, 3812 (Feb. 2,1996) (codified at 31 C.F.R. § 595.705) (terrorism sanction regulations); 70 Fed. Reg. 48,240, 48,524 (Aug. 16, 2005) (codified at 31 C.F.R. § 537.705) (Burmese sanctions regulations).

was understood and should be interpreted. In response to the district court's ruling in this very case, OFAC issued a rule revising 31 C.F.R. § 575.705 to read that, if the penalized individual does not make arrangements to pay within thirty days, "the matter may be referred for administrative collection measures by the Department of the Treasury or to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court." 70 Fed. Reg. 15,761, 15,762 (Mar. 29, 2005) (emphasis added). While OFAC does not argue that the revised regulation applies retroactively, it contends that the revision is dispositive proof that OFAC consistently has interpreted the collection regulation to provide for administrative collection in addition to civil suits in federal court. See 70 Fed. Reg. at 15,761 (stating that the rule was revised "to reaffirm that administrative collection of unpaid civil penalties imposed by OFAC is authorized in addition to judicial means of collection"). It is unclear why an interpretive statement added to the Federal Register post-litigation should be entitled to any more deference than the litigation position OFAC already advances. Indeed, although an agency interpretation first articulated in a legal brief is not categorically "unworthy of deference," OFAC's position appears to be little more than a "*post hoc* rationalization advanced . . . to defend past agency action against attack." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (internal quotation marks omitted) (alteration in original). Even if OFAC's interpretive statement represents the agency's reasoned interpretation as of 2005, it tells us nothing of the agency's interpretation during the life of the Iraqi Sanctions. As such, the statement in the Federal Register is neither controlling nor particularly helpful.

Third, OFAC makes the novel claim that section 575.705's "silence concerning administrative collection

remedies" permits the use of those remedies in satisfaction of the regulatory requirement. In other words, a regulation or statute mandating that an agency "shall" do x in fact means that it "shall" do x or y, unless the statute or regulation explicitly states that it "shall not" do y. This proposed "rule of the silent disjunctive" is patently absurd. By OFAC's rationale, the Endangered Species Act's requirement that the final determination of whether a species is threatened "shall be published in the Federal Register" could also be satisfied by publishing that information in USA Today. Though the Mandatory Victims Restitution Act requires that the sentencing court *shall* order the defendant to pay restitution, applying OFAC's proposed interpretive rule, the sentencing court could also comply with the statute by ordering the defendant to make a public apology. Or, to bring the examples closer to home, the requirement of former 31 C.F .R. § 575.521 that an application for a license to send medicine to Iraq "shall be made in advance" of the exportation could have been satisfied by Sacks if he submitted an application in advance I within ten years following the exportation.

We rejected a similar argument in *Webber*, where the warden asserted that a regulation stating that he "shall" identify outdoor smoking areas at federal prison facilities, to prevent employee exposure to second-hand smoke, also would allow him to achieve that goal by banning all smoking at the facility, 158 F.3d at 461. Our view has not changed. We will not require that Congress or an agency articulate all of the acts the agency may *not* engage in simply to guarantee that mandatory prescriptions are followed.

Our decision in *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767 (9th Cir. 1985), is not to the contrary. In *Lawrence*, a commodities broker

consented to findings that he had violated the Commodities Exchange Act and agreed to pay a $3,500 civil penalty. *Id.* at 769. When he refused to pay the penalty, the Commodity Futures Trading Commission suspended his registration pursuant to a statutory provision allowing it to do so if an individual violated one of its rules or orders. *Id.* at 770 & n.5 (citing 7 U.S.C. §§ 12a(3)-(4)). Lawrence argued that the Commission was powerless to suspend him because a separate statutory provision stated that "collection of overdue money penalties imposed by the [Commission] shall be referred to the Attorney General for recovery in a federal district court action." Id. at 771 (citing 7 U.S.C. § 9a). We rejected Lawrence's claim, holding that referral to the Justice Department was not intended to be the Commission's "exclusive remedy for violation of its orders to pay fines." *Id.* at 772. Despite OFAC's multiple citations to it, Lawrence is inapposite. The alternative remedy taken by the Commission, suspension of Lawrence's registration, was explicitly articulated in the same statute, whereas nothing in the Iraqi Sanctions regulations mentions administrative collection. Furthermore, as we recognized in *Lawrence*, suspension of the license and referral to the Justice Department were not mutually exclusive remedies. *See Id.* at 771-72. The *Lawrence* court was not required to reach the question of whether the agency could *collect* the penalty using means other than Justice Department referral because suspension of his registration was a different punishment altogether.

[15] Rather than adopt OFAC's troublesome "rule of the silent disjunctive," we hold that the plain language of the regulation authorizes no other methods for the collection of unpaid penalties. Because the regulation is clear, no deference is owed to OFAC's questionable interpretation. *See Thomas Jefferson Univ.*, 512 U.S. at 512. If OFAC wishes to collect the $10,000 penalty from

Sacks, it may do so by referring the matter to the Department of Justice for the filing of a civil suit in federal district court as its own regulation mandates.

VI. CONCLUSION

Sacks lacks standing to challenge the Medicine Restrictions, and his challenge to the Travel Ban fails because OFAC's power to promulgate it was authorized by the UNPA and not limited by any other statute. Therefore, the penalty against Sacks is valid. However, OFAC is precluded by its own then-operative regulations from utilizing the Ocwen Federal Bank or any private third-party entity to collect the $10,000 penalty from Sacks. Therefore, we AFFIRM the district court's order dismissing Sacks's complaint for declaratory relief. We also AFFIRM the district court's order enjoining OFAC from collecting the penalty from Sacks in a manner inconsistent with the then-effective version of 31 C.F.R. § 575.705.

AFFIRMED.

SEA_DOCS:830794.1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS, Plaintiff, vs. OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, and RICHARD NEWCOMB, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, Defendants.	NO. C04-108JLR **ORDER**

I.
INTRODUCTION

This matter comes before the court on Defendants' motion to dismiss Plaintiff's complaint. (Dkt. # 8). For the reasons stated below, the court grants Defendants' motion in part and denies it in part. In addition, because there is no further relief to grant to either party, the court dismisses this action.

II.
BACKGROUND

Plaintiff is a member of Voices in the Wilderness ("Voices"), an unincorporated organization that provides humanitarian assistance to Iraqi citizens suffering as a result of the worldwide embargo on trade with Iraq in

place since 1990. Although Plaintiff made several trips to Iraq to deliver humanitarian aid, it was a November 1997 trip that is at issue in Plaintiff's current dispute with the Office of Foreign Asset Control ("OFAC").

OFAC, an agency of the United States Department of the Treasury, had issued two regulations governing the activities of United States citizens in Iraq. The first, the "Travel Ban," prohibits travel-related expenditures for travel to or within Iraq:

> Except as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq.... This section prohibits the unauthorized payment by a U.S. person of his or her own travel or living expenses within Iraq.

31 C.F.R. § 575.207. The second regulation, the "Medicine Restriction," prohibits the export of medicine to Iraq except as licensed by OFAC:

> Except as otherwise authorized, no goods ... may be exported from the United States ... to any entity operated from Iraq, except donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has

> been specifically licensed pursuant to [other OFAC regulations].

31 C.F.R. § 575.205.

On December 3, 1998, OFAC sent a pre-penalty notice to Mr. Sacks, Voices, and other members of Voices. The only allegation specifically directed to Mr. Sacks was that he had violated the Travel Ban by traveling "to/from/within" Iraq and making incidental payments for living expenses. OFAC also alleged that Voices had violated the Medicine Restriction by importing medical supplies, toys, and other goods into Iraq.

On January 8, 1999, Mr. Sacks offered a written response to the pre-penalty notice in which he admitted to bringing medicine to Iraq. There was no further contact between the parties until May 17, 2002, when OFAC issued a penalty notice fining Plaintiff $10,000 for his violation of the Travel Ban.

OFAC has chosen to use a collection agency, Ocwen Federal Bank, to collect the $10,000 penalty it levied against the Plaintiff. Ocwen Federal Bank has contacted Plaintiff at least once in an effort to collect the penalty.

Plaintiff brought the instant action alleging that OFAC lacked the statutory authority to issue both the Travel Ban and the Medicine Restriction. In addition, Plaintiff seeks a declaration that the challenged regulations are unconstitutional because they violate international law. He claims that OFAC's effort to collect the civil penalty against him is time-barred. He also seeks injunctive relief against OFAC's collection efforts.

III.
ANALYSIS

OFAC's purely legal challenges to Plaintiff's complaint are appropriately addressed in a Fed. R. Civ. P. 12(b)(6) motion to dismiss. The court may dismiss a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In reviewing the allegations of the complaint, all material allegations are accepted as true, as well as all reasonable inferences to be drawn from them. Id. A motion to dismiss is also properly granted where the plaintiff has no "cognizable legal theory" to tie the factual allegations into a claim upon which the court can grant relief. Id.

A. The Travel Ban Is Valid and Enforceable.

The Travel Ban (like the Medicine Restriction) is the result of a series of executive and legislative actions that began when Iraq invaded Kuwait in 1990. On August 6, 1990, the United Nations Security Council issued Resolution No. 661, which called for member nations to restrict all economic transactions with Iraq. S.C. Res. 661(3)(c), U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/660 (1990). The Resolution exempted humanitarian aid from the scope of the sanctions it imposed. Id. (sanctions do not "includ[e] supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs"). President George H.W. Bush then issued Executive Order 12,724, ordering the Secretary of the Treasury to promulgate regulations enforcing the sanctions called for in the Security Council resolution.[1] 50 Fed. Reg. at 33089.

---

[1] Executive Order 12,722, which was similar, was superseded by Executive Order 12,724. 50 Fed. Reg. at 33089.

OFAC in turn issued regulations that included the Medicine Restriction and the Travel Ban.

In August of this year, the court in Office of Foreign Assets Control v. Voices in the Wilderness upheld the Medicine Restriction against Voices' contentions that OFAC lacked statutory and constitutional authority to issue it. 329 F. Supp. 2d 71 (D.D.C. 2004). Although Voices is not precedential authority, the court agrees with its analysis of the Medicine Restriction. The Voices court determined that the Executive Order authorized OFAC to issue the Medicine Restriction. Id. at 77-78. It also determined that the Executive Order itself was lawful, as it was authorized by the United Nations Participation Act ("UNPA"). Id. at 78. UNPA gives the President broad authority to take measures necessary to implement Security Council resolutions. It provides that:

> Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, . . . regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal,

> telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof ....

22 U.S.C. § 287c(a). Although other federal statutes provide more limited presidential authority, and limit the President's ability to restrict humanitarian aid (e.g., 50 U.S.C. § 1702(b)), UNPA gives the President the authority to implement Security Council resolutions "[n]otwithstanding the provisions of any other law." 22 U.S.C. § 287c(a). In short, the court agrees with the Voices court that the Medicine Restriction was valid. The Voices analysis is equally applicable to the Travel Ban.

Plaintiff Sacks advances one argument that the Voices court did not expressly consider. He notes that Resolution No. 661 expressly excludes humanitarian aid from the scope of the sanctions to be imposed against Iraq. S.C. Res. 661(3)(c), U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/660 (1990) (sanctions do not "includ[e] supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs"). UNPA, in turn, only authorizes presidential action "to the extent *necessary* to apply" Security Council measures. 22 U.S.C. § 287c(a) (emphasis added). Plaintiff argues that regulations on travel for humanitarian purposes were not necessary to implement the Security Council Resolution, and thus even if the Executive Order authorized such measures, it did so without legal authority.

Although Plaintiff presents a compelling argument, it is an argument that ignores the decision of Congress to ratify the Iraqi sanctions regime. In the Iraqi Sanctions Act of 1990, Congress directed the President to "continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing" pursuant to Executive Order 12,724. Pub. L. No. 101-513, 104 Stat. 2047-2054 (codified at 50 U.S.C. § 1701). As Congress ratified the Executive Order on which the Travel Ban and Medicine Restriction were based,[2] the court must reject Plaintiff's argument that the Executive Order directed measures that were not "necessary" (under UNPA) to enforce Resolution No. 661.

B. Even if Plaintiff Has Standing to Challenge It, the Medicine Restriction is Valid and Enforceable.

OFAC contends that Plaintiff does not have standing to challenge the Medicine Restriction, because OFAC has never contended that Plaintiff violated the Medicine Restriction. A plaintiff seeking to challenge a federal statute or regulation must generally prove that he has suffered or will suffer an injury, that the challenged statute or regulation caused the injury, and that the court can provide redress for the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992).

---

[2] The Iraqi Sanctions Act also required that any regulations promulgated after the Act (after November 5, 1990) were to be submitted to Congress. The challenged regulations were issued in January 1991, and it does not appear that they were submitted to Congress. Although OFAC may have neglected its statutory duties, this is not a basis for invalidating the challenged regulations. In re Surface Mining Regulation Litig., 627 F.2d 1346, 1365 (D.C. Cir. 1980).

OFAC argues that Plaintiff Sacks has suffered no injury as a result of the Medicine Restriction.

Plaintiff does not contest that OFAC has not attempted to penalize him for violating the Medicine Restriction,[3] but Plaintiff contends that his admitted violation of the Medicine Restriction, coupled with OFAC's aggressive enforcement policy, means that the threat that he will be penalized is sufficient to confer standing. He notes that in its pre-penalty notice, OFAC not only alleged that Plaintiff violated the Travel Ban, but also that Voices, an organization to which Plaintiff belongs, violated the Medicine Restriction.

Although the parties present an intriguing argument on the standing issue, the court finds it unnecessary to resolve it.[4] Whether Plaintiff has standing to contest the Medicine Restriction or not, his challenge fares no better than his challenge to the Travel Ban. The Court's discussion of the statutory authority for the Travel Ban, supra, applies equally to the Medicine Restriction. The Medicine Restriction is a

---

[3] At oral argument, Plaintiff suggested that because one must necessarily "travel" in order to deliver food and medicine, the court can conflate the Travel Ban and the Medicine Restriction for standing purposes. The court disagrees. The two regulations proscribe different sets of conduct, and Plaintiff was penalized only for his travel-related expenditures in Iraq.

[4] The court has considered OFAC's late-filed motion to file a supplementary brief on the standing issue. (Dkt. # 28). The court has granted that motion, and has considered OFAC's arguments in the supplemental brief. Given the court's disposition of the issue, the court finds it unnecessary to grant Plaintiff an opportunity to respond to the supplemental brief.

valid exercise of authority granted to OFAC through Executive Order 12,724 and the Iraqi Sanctions Act.

C. International Law Does Not Render the Regulations Unconstitutional.

Plaintiff cites four sources of international law that he believes render the challenged regulations unconstitutional. Plaintiff does not explain how the United States Constitution incorporates these principles of international law. Nor does Plaintiff contest that international law is not binding on the United States unless the United States ratifies the law or the law is "self-executing." Whitney v. Robinson, 124 U.S. 190, 194 (1888).

The court finds that the international law upon which Plaintiff relies is not binding on the United States. The United Nations Convention on the Rights of the Child is not self-executing, and the United States Senate has declined to ratify it. Flores v. Southern Peru Copper Corp., 343 F.3d 140, 165 (2d Cir. 2003). The same is true of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984). Although the United States has ratified part of the Convention on the Prevention and Punishment of the Crime of Genocide, it also provided that the Convention creates no "substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. § 1092. Finally, the Universal Declaration of Human Rights is aspirational, not binding, and is not recognized as law in the United States. Flores, 343 F.3d at 165.

Customary international law also provides no defense for the Plaintiff. Plaintiff argues that even if the international law he cites has not been ratified or enacted in the United States, customary international

law embodying the same principles is controlling. Even if the court accepts the Plaintiff's interpretation of the relevant customary international law, it cannot overlook the executive and legislative acts that expressly address sanctions against Iraq. Customary international law is not binding where there is a controlling legislative or executive act addressing the same subject. Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996). International law does not provide Plaintiff with a legally cognizable claim against the challenged regulations.

D. OFAC's Effort to Collect Its Penalty From Plaintiff is Not Time-Barred.

Plaintiff contends that OFAC's effort to collect its $10,000 penalty is barred by the five-year statute of limitations in 28 U.S.C. § 2462, which provides that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued ....

Plaintiff argues that OFAC's penalty arises from Plaintiff's November 1997 trip to Iraq, which was more than five years before OFAC initiated efforts to collect its penalty through Ocwen Federal Bank in August 2003.

Both parties assume that the phrase "proceeding for the enforcement of any ... penalty" applies exclusively to proceedings to collect penalties like the one that OFAC imposed against him. The phrase has been interpreted to include any proceeding for the *imposition* of a penalty. 3M Co. v. Browner, 17 F.3d 1453, 1457-59 (D.C. Cir. 1994). The Browner court held that an agency's effort to impose a penalty is itself a "proceeding for the enforcement" of the penalty. Id. at 1459 (holding that a contrary result would be "inconceivable"); Federal Election Comm. v. Williams, 104 F.3d 237, 240 (9th Cir. 1996) (adopting the Browner view of 28 U.S.C. § 2462). OFAC commenced its proceeding to enforce its penalty against Plaintiff in December 1998, when it sent its pre-penalty notice to the Plaintiff. That proceeding concluded in May 2002, when OFAC issued its final penalty notice against Plaintiff. Regardless of which date is relevant, the court finds that OFAC commenced its enforcement proceeding within the five-year statute of limitations (which would not have run until November 2002).

E. OFAC's Regulations Bar the Use of a Collection Agency to Collect Its Penalty From Plaintiff.

Although OFAC met the applicable statute of limitations for enforcing its penalty against Plaintiff, the court asked the parties to provide supplemental briefing to address whether OFAC is subject to restrictions on its effort to *collect* on that penalty. In particular, OFAC's own regulations provide that in the event that a person does not pay or make arrangements to pay an OFAC penalty within 30 days of its issuance, "[T]he matter shall be referred to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court." 31 C.F.R. § 575.705. OFAC has not referred the matter

to the Department of Justice; it has chosen to use a collection agency to collect its penalty.[5]

Plaintiff argues that 31 C.F.R. § 575.705 unambiguously bars any method of penalty collection except reference to the Department of Justice for a civil suit. Although a court should ordinarily defer to an agency's interpretation of its own regulations, deference is not necessary where the language of the regulation is unambiguous. Ward's Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002).

OFAC argues that the regulation is ambiguous, because while it might mandate a referral of a penalty to the Department of Justice, it is silent as to the availability of other remedies. Moreover, OFAC points out that both statutes and regulations generally applicable to the Treasury provide that multiple collection remedies are usually encouraged. 31 U.S.C. § 3718(a); 31 C.F.R. § 5.2(e). OFAC thus contends that the meaning of 31 C.F.R. § 575.705 is that OFAC may refer penalties to the Department of Justice or it may refer them to a collection agency.

Given the substantial deference owed to OFAC in interpreting its regulations, the court might be inclined to accept OFAC's position. See Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1076 (9th Cir. 2001) (recognizing limitations on deference to agency interpretation). To do so, however, would be to ignore the 13 other regulatory subchapters that expressly

---

[5] Plaintiff urges the court to hold that the Federal Debt Collection Procedure Act ("FDCPA") (28 U.S.C. §§ 3001-3015) prevents OFAC from using a collection agency. OFAC correctly points out that 31 U.S.C. § 3718 authorizes OFAC to use a collection agency, although that agency must follow the FDCPA.

state what OFAC asks the court to read into 31 C.F.R. § 575.705. For example, the Iraqi sanctions' closest neighbor in the Code of Federal Regulations is at 31 C.F.R. subchapter 585. That subchapter establishes sanctions for prohibited transactions with the Federal Republic of Yugoslavia. At 31 C.F.R. § 585.705, OFAC provides that if a person does not pay an OFAC penalty within 30 days, "[T]he matter shall be referred for administrative collection measures or to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court." This provision, or its substantial equivalent, is repeated in three other subchapters relating to OFAC prohibitions on transactions with regions in the Baltics (31 C.F.R. §§ 586.705, 587.705, 588.705), six other OFAC regulations on transactions with Angola (31 C.F.R. § 590.705), Iran (31 C.F.R. § 560.706), Afghanistan (31 C.F.R. § 545.705), the Sudan (31 C.F.R. § 538.705), Burma (31 C.F.R. § 537.705), and Cuba (31 C.F.R. § 515.718), as well as OFAC prohibitions on transactions in weapons of mass destruction (31 C.F.R. § 539.705), highly enriched uranium (31 C.F.R. § 540.705), and narcotics (31 C.F.R. § 536.705). The only regulations dictating that penalty collections "shall be referred" to the Department of Justice without mentioning administrative collection measures are the Iraq sanctions regulations at issue here, older regulations on transactions with Iran (31 C.F.R. § 535.705), and regulations on transactions with Libya (31 C.F.R. § 550.706).[6]

---

[6] The court recognizes that changes in the political climate may have caused OFAC to rescind or amend some of the regulations listed above, or at least adopt different enforcement policies. Those changes would not, however, affect the court's analysis of the regulation in question.

The court does not dispute that OFAC was authorized to enact regulations that permit it to use extra judicial means of collection. The statute and regulation that authorize such means, however, are merely permissive. 31 U.S.C. § 3718(a) ("Under conditions the head of an executive ... agency considers appropriate, the head of the agency may enter into a contract with a person for collection service to recover indebtedness owed"); 31 C.F.R. § 5.2(e) ("Use of multiple collection remedies allowed."). A review of OFAC regulations shows that OFAC often chooses to exercise that authority by issuing regulations that allow multiple avenues for penalty collection. For the Iraqi regulations in question, OFAC chose not to do so. Even giving substantial deference to OFAC's interpretations of its regulations, the court finds that 31 C.F.R. § 575.705 requires OFAC to use the Department of Justice to collect penalties for violations of the Iraqi Travel Ban.

IV.
CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss (Dkt. # 8) in part, and DENIES it in part.

The only claim remaining in Plaintiff's complaint is its request for injunctive relief against OFAC's unlawful attempts to collect a penalty against him. It is not clear whether OFAC has any continuing control over Ocwen Federal Bank's efforts to collect OFAC's penalty from Plaintiff. To the extent that OFAC continues to exercise such control, the court ORDERS that OFAC is enjoined from using any means of collecting its penalty against Plaintiff that is inconsistent with this order. As Ocwen Federal Bank is not a party to this action, the court cannot enter an order enjoining it.

The court also notes that Plaintiff in his supplemental brief, and at oral argument, suggests that he has brought a claim contesting the amount of the penalty that OFAC levied. Although Plaintiff could possibly bring this challenge in the form of a claim under the Administrative Procedures Act or otherwise, the court finds that even a generous reading of the complaint shows that Plaintiff has brought no such claim. Even if there were such a claim, the court's decision that OFAC cannot use extrajudicial means to collect its penalty means that Plaintiff's objection to the amount of that penalty is not yet ripe for consideration by this court.

As there is no further relief to grant to either party, this action is DISMISSED.

DATED this 22nd day of October, 2004.

s/James L. Robart
JAMES L. ROBART
United States District Judge

SEA_DOCS:830778.1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS,	)	
	)	
Plaintiff,	)	
	)	CASE NO. C04-108JLR
v.	)	
	)	ORDER
OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, et al.	)	
	)	
Defendants.	)	

I. INTRODUCTION

This matter comes before the court on two related motions from the Defendants: Defendants' Motion for a Protective Order Staying Discovery (Dkt. # 17) and Defendants' Motion for Extension of Time to Respond to Pending Discovery (Dkt. #20). For the reasons stated below, the court GRANTS both motions and stays discovery in this matter until the court orders the stay lifted.

II. BACKGROUND & ANALYSIS

Plaintiff Sacks filed this action challenging the authority of the United States to issue various restrictions on financial transactions and other activity by United States citizens in Iraq. Defendants have responded with a motion to dismiss plaintiff's complaint. On August 26, 2004, the court ordered the parties to provide supplemental briefing on two issues relevant to the Defendants' Motion to Dismiss.

The court is persuaded that the parties should not engage in an expensive discovery effort before the court determined the scope of this litigation in its ruling on Defendants' Motion to Dismiss. For that reason, the court will stay discovery in this action until further order of the court.

III. CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motions (Dkt. ##17, 20). Discovery in this action is stayed until further order of the court.

DATED this 31st day of August, 2004.

s/James L. Robart
United States District Judge

SEA_DOCS:830918.1

The United Nations (UN) Participation Act, 22 U.S.C. § 287c(a), provides in relevant part:

§ 287c. Economic and communication sanctions pursuant to United, Nations Security Council Resolution

(a) Enforcement measures; importation of Rhodesian chromium

Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 4 I of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

The Iraq Sanctions Act, Pub.L.101-513, §§ 586-586J, 104 Stat. 2047, codified at 50 U.S.C. §1701 note, provides in part:

§ 586A. Declarations Regarding Iraq's Invasion of Kuwait.

The Congress-

(1) condemns Iraq's invasion of Kuwait on August 2, 1990;

(2) supports the actions that have been taken by the President in response to that invasion;

(3) calls for the immediate and unconditional withdrawal of Iraqi forces from Kuwait;

(4) supports the efforts of the United Nations Security Council to end this violation of international law and threat to international peace;

(5) supports the imposition and enforcement of multilateral sanctions against Iraq;

(6) calls on United States allies and other countries to support fully the efforts of the United Nations Security Council, and to take other appropriate actions, to bring about an end to Iraq's occupation of Kuwait; and

(7) condemns the brutal occupation of Kuwait by Iraq and its gross violations of internationally recognized human rights in Kuwait, including widespread arrests, torture, summary executions, and mass extrajudicial killings.

§ 586C. Trade Embargo Against Iraq.

(a) CONTINUATION OF EMBARGO. -- Except as otherwise provided in this section, the President shall continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing, in response to Iraq's invasion of Kuwait, pursuant to Executive Orders

Numbered 12724 and 12725 (August 9, 1990) and, to the extent they are still in effect, Executive Orders Numbered 12722 and 12723 (August 2, 1990).

Executive Order 12722 of August 2, 1990

55 FR 31803

August 3, 1990 --

TEXT: By the authority vested in me as President by the constitution and laws of the United states of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies act (50 U.S.C. 1601 et seq.), and section 301 of title 3 of the United States Code.

I, GEORGE BUSH, President of the United States of America, find that the policies and actions of the Government of Iraq constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. All property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Section 2. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order:

(a) The import into the United States of any goods or services of Iraqi origin, other than publications and other informational materials;

(b) The export to Iraq of any goods, technology (including technical data or other information controlled for export pursuant to Section 5 of the Export

administration Act (50 U.S.C. App. 2404)) or services from the United States, except publications and other informational materials, and donations of articles articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes;

(c) Any transaction by a United States person relating to transportation to or from Iraq; the provision of transportation to or from the United states by any Iraqi person or any vessel or aircraft of Iraqi registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1514), of any transportation by air which includes any stop in Iraq;

(d) The purchase by any United States person of goods for export from Iraq to any country;

(e) The performance by any United States person of any contract in support of an industrial or other commercial or governmental project in Iraq;

(f) The grant or extension of credits or loans by any United States person to the Government of Iraq, its instrumentalities and controlled entities;

(g) Any transaction by the United States person relating to travel by any United States citizen or permanent resident alien to Iraq, or to activities by any such person within Iraq, after the date of this Order, other than transactions necessary to effect such person's departure from Iraq, or travel for journalistic activity by persons regularly employed in such capacity by a newsgathering organization; and

(h) Any transaction by the United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order.

For purposes of this Order, the term "United States person" means any United States citizen, permanent

resident alien, juridical person organized under the laws of the United States, or any person in the United States.

Section 3. This Order is effective immediately.

Section 4. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order. Such actions may include prohibiting or regulating payments or transfers of any property or any transactions involving the transfer of anything of economic value by any United States person to the Government of Iraq, its instrumentalities and controlled entities, or to any Iraqi national or entity owned or controlled, directly or indirectly, by Iraq or Iraqi nationals. The Secretary may redelegate any of these functions to other officers and agencies of the Federal government. All agencies of the United States government are directed to take all appropriate measures within their authority to carry out the provisions of this Order, including the suspension or termination of licenses or other authorizations in effect as of the date of this Order.

This Order shall be transmitted to the Congress and published in the Federal Register.

SEA_DOCS:830911.1

Executive Order 12724, 55 Fed. Reg. 33089 (Aug. 9, 1990) reprinted at 50 U.S.C. §1701 note, provides in part:

Executive Order 12724: Blocking Iraqi Government Property and Prohibiting Transactions With Iraq

By the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act(50U.S.C.1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 301 of title 3 of the United States Code, and the United Nations Participation Act (22 U .S.C. 287 c), in view of United Nations Security Council Resolution No. 661 of August 6, 1990, and in order to take additional steps with respect to Iraqis invasion of Kuwait and the national emergency declared in Executive Order No. 12722,

I, GEORGE BUSH, President of the United States of America, hereby order:

***

Sec. 2. The following are prohibited, except to the extent provided in regulations that may hereafter be issued pursuant to this order:

(a) The importation into the United States of any goods or services of Iraqi origin, or any activity that promotes or is intended to promote such importation;

(b) The exportation to Iraq, or to any entity operated from Iraq, or owned or controlled by the Government of Iraq, directly or indirectly, of any goods, technology (including technical data or other information), or services either (i) from the United States, or (ii) requiring the issuance of a license by a

Federal agency, or any activity that promotes or is intended to promote such exportation, except donations of articles intended to relieve human suffering, such as food and supplies intended strictly for medical purposes;

(c) Any dealing by a United States person related to property of Iraqi origin exported from Iraq after August 6, 1990, or property intended for exportation from Iraq to any country, or exportation to Iraq from any country, or any activity of any kind that promotes or is intended to promote such dealing;

(d) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Iraq, or to activities by any such person within Iraq, after the date of this order, other than transactions necessary to effect (i) such person's departure from Iraq, (ii) travel and activities for the conduct of the official business of the Federal Government or the United Nations, or (iii) travel for journalistic activity by persons regularly employed in such capacity by a news-gathering organization;

(e) Any transaction by a United States person relating to transportation to or from Iraq; the provision of transportation to or from the United States by any Iraqi person or any vessel or aircraft of Iraqi registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 et seq.), of any transportation by air that includes any stop in Iraq;

(f) The performance by any United States person of any contract, including a financing contract, in support of an industrial, commercial, public utility, or governmental project in Iraq;

(g) Except as otherwise authorized herein, any commitment or transfer, direct or indirect, of funds, or other financial or economic resources by any United States person to the Government of Iraq or any other person in Iraq;

(h) Any transaction by any United States person that evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this order.

***

Sec. 5. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this order. Such actions may include prohibiting or regulating payments or transfers of any property or any transactions involving the transfer of anything of economic value by any United States person to the Government of Iraq, or to any Iraqi national or entity owned or controlled, directly or indirectly, by the Government of Iraq or Iraqi nationals. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the Federal Government. All agencies of the Federal Government are directed to take all appropriate measures within their authority to carry out the provisions of this order, including the suspension or termination of licenses or other authorizations in effect as of the date of this order.

31 C.F.R § 575.205 (including the Medicine Restriction), provides:

§ 575.205. Prohibited exportation and reexportation of goods, technology, or services to Iraq.

Except as otherwise authorized, no goods, technology (including technical data or other information), or services may be exported from the United States, or, if subject to U.S. jurisdiction, exported or reexported from a third country to Iraq, to any entity owned or controlled by the Government of Iraq, or to any entity operated from Iraq, except donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has been specifically licensed pursuant to § 575.507, 575.517 or 575.518.

31 C.F.R. § 575.207 (the Iraq Travel Ban), provides:

§ 575.207 Prohibited transactions relating to travel to Iraq or to activities within Iraq.

Except as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq, after the effective date, other than transactions:

(a) Necessary to effect the departure of a U.S. citizen or permanent. resident alien from Kuwait or Iraq;

(b) Relating to travel and activities for the conduct of the official business of the United States Government or the United Nations; or

(c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.

This section prohibits the unauthorized payment by a U.S. person of his or her own travel or living expenses to or within Iraq.

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990)

The Security Council,

Reaffirming its resolution 660 (1990) of 2 August 1990,

Deeply concerned that that resolution has not been implemented and that the invasion by Iraq of Kuwait continues, with further loss of human life and material destruction,

Determined to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait,

Noting that the legitimate Government of Kuwait has expressed its readiness to comply with resolution 660 (1990),

Mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Affirming the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,

Acting under Chapter VII of the Charter,

1. *Determines* that Iraq so far has failed to comply with paragraph 2 of the resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait;

2. *Decides*, as a consequence, to take the following measures to secure compliance of Iraq with paragraph 2

of resolution 660 (1990) and to restore the authority of the Government of Kuwait;

***

4. *Decides* that all States shall not make available to the Government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. *Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or license granted before the date of the present resolution;

****

Adopted at the 2933rd meeting by 13 votes to none, with 2 abstentions (Cuba and Yemen).

SEA_DOCS:830900.1

Convention on the Prevention and Punishment of the Crime of Genocide

Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948

Entry into force: 12 January 1951, in accordance with article XIII

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole

or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its phy ical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

...

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

...

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

...

Have agreed as follows:

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to

ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized

in the present article. In this regard, particular account shall be taken of the needs of developing countries.

SEA_DOCS:830906.1

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

Art. 23. Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) that the consignments may be diverted from their destination,
(b) that the control may not be effective, or
(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the

persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

SEA_DOCS:830904.1

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc 1/810 at 71 (1948)

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the

destruction of any of the rights and freedoms set forth herein.

SEA_DOCS:830902.1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS, Plaintiff, vs. OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, and RICHARD NEWCOMB, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, Defendants.	NO. C04-108C **AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Bertram Sacks alleges:

I.
PARTIES

1. Plaintiff Bertram Sacks is a citizen of the State of Washington. He resides in Seattle, Washington, in the Western District of Washington. This case arises from Mr. Sacks's journeys to Iraq. On each trip, Mr. Sacks has brought medicine and medical supplies for use in civilian hospitals there. He has done so to publicize and ameliorate the effect of economic sanctions imposed by the government of the United States. These sanctions have led to widespread suffering and death of Iraqi civilians, especially children.

2. Defendant Office of Foreign Assets Control is an agency of the United States government. Defendant R. Richard Newcomb is, and at all material times has been, the Director of the Office of Foreign Assets Control. For the sake of convenience, the defendants, and each of them, shall be referred to as "OFAC." In furtherance of, and as part of, economic sanctions, OFAC has promulgated regulations that prohibit certain transactions in Iraq. Purporting to act under those regulations. OFAC has announced its intention to impose a $10,000 civil penalty on Mr. Sacks for traveling to Iraq with medical supplies.

3. OFAC's fine, and the regulations under which OFAC imposed that fine, violate statutory law, executive orders, international law, and the United States Constitution. Mr. Sacks seeks injunctive relief, and declaratory relief under 28 U.S.C. § 2201, that will stop OFAC's unlawful enforcement of an alleged $10,000 civil penalty against Mr. Sacks.

II.
JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter under 28 U.S.C. §1331, as this case arises under the laws of the United States. This Court also has subject matter jurisdiction under 28 U.S.C. § 1337, as this case arises under an Act of Congress regulating commerce. This Court further has subject matter jurisdiction under 28 U.S.C. § 1346(a)(2), as this is an action against the United States for an amount not exceeding $10,000 and founded upon the Constitution, Acts of Congress, and regulations promulgated by the defendant. This Court further has subject matter of this action, as it has jurisdiction of the underlying claims by OFAC against Mr. Sacks under 28 U.S.C. §§ 1331, 1337, and 2461(a).

5. Venue in the Western District of Washington is proper under 28 U.S.C. § 1391(e), as Mr. Sacks resides therein and no real property is involved in this action.

III.
OPERATIVE FACTS

A. Background.

6. On August 2, 1990, Iraq invaded Kuwait. In response, then-President George H.W. Bush declared a "national emergency" pursuant to Executive Order 12722. That "national emergency" remains in effect to the present day. Executive Order 19890 (July 31, 2003). In Executive Order 12722 and in Executive Order 12724 dated a week later, President Bush authorized the imposition of economic sanctions on Iraq.

7. Iraq's invasion led to the First Gulf War. A coalition led by the United States defeated Iraq after an extensive bombing campaign.

8. Immediately after the conclusion of the First Gulf War, in March 1991, the United Nations reported on the extensive damage to Iraqi infrastructure caused by the U.S.-led bombing campaign. Then-Secretary-General Javier Perez de Cuellar dispatched a mission headed by Under-Secretary-General Martti Ahtisaari to assess the situation in Iraq. The Under-Secretary-General reported:

> I and the members of my mission were fully conversant with media reports regarding the situation in Iraq and, of course, with the recent

> WHO/UNICEF report on water, sanitary, and health conditions in the Greater Baghdad area. It should, however, be said at once that nothing we had seen or read had quite prepared us for the particular form of devastation which has now befallen the country. The recent conflict has wrought near-apocalyptic results upon the economic infrastructure of what had been, until January 1991, a rather highly urbanized and mechanized society. Now, most means of modern life support have been destroyed or rendered tenuous. Iraq has, for some time to come, been relegated to a pre-industrial age, but with all the disabilities of post-industrial dependency on an intensive use of energy and technology.

The report recommended an immediate end to the embargo on imports of food and other essential supplies to prevent "imminent catastrophe."

B. OFAC's Regulations in Response to the "National Emergency."

9. In January 1991, OFAC first promulgated regulations to enforce economic sanctions

gainst the people of Iraq. Those regulations appear at 31 CFR Part 575.

10. OFAC purported to act under 50 U.S.C. § 1701(a) & 1702. These statutes grant the President certain powers to deal with an "unusual and extraordinary threat" posed by a "national emergency" declared by the President. Among those powers is the power to regulate certain financial transactions. These powers "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . ." 50 U.S.C. § 1701(b).

11. OFAC's regulations prohibit the importation of goods into Iraq. The regulations include donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes" unless those imports are "specifically licensed" by OFAC. 31 CFR § 575.205. OFAC's regulations do not state the criteria by which OFAC grants such licenses. Nor do the regulations impose any deadline on OFAC to grant such licenses. Hence, OFAC has reserved to itself the unrestricted and unfettered power to keep food and medical supplies from reaching people in Iraq who need them.

12. OFAC has also prohibited travel to Iraq, including travel for the purpose of bringing food and medical supplies to the Iraqi people. 31 CFR § 575.207 provides in relevant part, and subject to very limited exceptions, that "no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq." OFAC also prohibited "[a]ny transaction by a U.S. person relating to transportation to or from Iraq." 31 CFR § 575.208.

C. Enter Bert Sacks.

13. Bert Sacks has traveled to Iraq nine times. On each trip, Mr. Sacks has brought medicine and medical supplies and distributed them to civilians, many of them children, in civilian hospitals in Iraq. In 1997, he helped bring roughly $40,000 worth of medicine into Iraq for the purpose of relieving human suffering. Mr. Sacks also brought medicine and medical supplies to Iraq to publicize the effect of economic sanctions on the people of Iraq, especially children.

14. While in Iraq, Mr. Sacks has visited medical clinics and pediatric hospitals. He has seen the children who are dying there. Mr. Sacks has met with other U.S. citizens in Iraq to highlight the effects of U.S. policy there. Probably the best known among them is United States Representative Jim McDermott, who traveled to Iraq in 2002.

15. Mr. Sacks' November 1997 trip to Iraq was covered in the national news media. In response to this particular trip, OFAC sought to punish Mr. Sacks. On December 3, 1998, OFAC sent a written "Prepenalty Notice" to Mr. Sacks and others. A true and correct copy of the Prepenalty Notice is attached hereto as Exhibit 1. In the Prepenalty Notice, OFAC claimed Mr. Sacks had violated its regulations enforcing economic sanctions during his 1997 trip to Iraq. The Prepenalty Notice contained ten "counts," only one of which, Count 6, was directed at Mr. Sacks. Count 6 made the following charge:

> Between on or about [sic] November 21-30, 1997, Messrs. Handelman, Mullins, Sacks, and Zito, engaged in currency travel-related transactions

> to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals.

OFAC proposed a penalty of $10,000 for Mr. Sacks "for Count 6" and invited written comments within thirty days.

16. On December 28, 1998, Mr. Sacks wrote back to OFAC:

> I appreciate that you must see yourselves as doing your job to uphold US sanctions laws against Iraq, which I have violated. However I want to explain here, as I would to any personal friends of mine, why I have done this . . . .
>
> You are correct to say in your prepenalty letter (12/3/98) that I brought "medical supplies and toys to Iraq" absent prior OFAC approval. We all recognize, I hope, that the $40,000 of medicines we brought to Iraq --- despite the lives it saved --- was essentially a symbolic act: it lasted the 22 million people of Iraq

about 15 minutes, given their pre-sanctions needs of $1,000,000 of imported medicines per day. Further, we brought nothing towards the $10,000,000 of food imports Iraqis need per day. And we brought nothing towards the $22,000,000,000 of essential repairs for the life-supporting infrastructure needed to stop the water-borne epidemics in Iraq. These numbers long ago convinced me that the human crisis in Iraq cannot be solved by humanitarian aid --- but only by an end of economic sanctions.

The decision to turn to civil disobedience to end sanctions, in public defiance of the laws you are entrusted with enforcing, was not a natural one for me. I first spent two years of research, writing, and contacting people about the situation, but this failed to cast any significant public attention on the thousands of Iraqi children who were dying every month because of the bombed civilian infrastructure (unsafe

drinking water) and sanctions (lack of food and medicines). In deciding to publicly violate sanctions, two events and two people played an important role for me.

The first is knowing that 150 years ago it was the highest law of the United States of America that runaway slaves from the South were legally "stolen property" of their owners. Anywhere in this country, an American was breaking the law to help such a slave escape via the "underground railroad." The people I greatly admire from this terrible era in our history were not law-abiding citizens, but those who broke the law to help slaves. . . .

The second event influencing me is the deaths of millions of innocent civilians during WWII. I visited Auschwitz one year ago, just before my trip to Iraq. At both places over a million innocent civilians have died. I greatly admire the people who took personal risks to help Jews, against

> prevailing indifference and prejudice. . . .
>
> These two events are certainly not identical with events in Iraq, but the example of people motivated by high moral considerations to "break the law" has given me encouragement to do the same. . . .

17. After writing this letter, Mr. Sacks continued his work to call attention to the effect of economic sanctions, and the regulations through which OFAC seeks to enforce them, on the people of Iraq. Those sanctions have deprived many Iraqi civilians, especially children, of the food, clean water, and medicine they need to survive.

D. <u>Economic Sanctions Contribute To the Deaths of Thousands of Young Children in Iraq Every Month.</u>

18. Economic sanctions have prevented Iraq from rebuilding water treatment plants destroyed in the First Gulf War. Water treatment facilities were fairly widespread in Iraq until many were bombed during the First Gulf War, along with virtually all of the country's electrical-generating plants that powered Iraq's water and sewage treatment facilities. The resulting lack of potable water has led to the outbreak of severe diarrhea among young children, which is often fatal in the absence of medical treatment. OFAC regulations, however, have prevent people like Mr. Sacks from bringing medicine and medical supplies to Iraq. OFAC regulations also effectively prohibit the

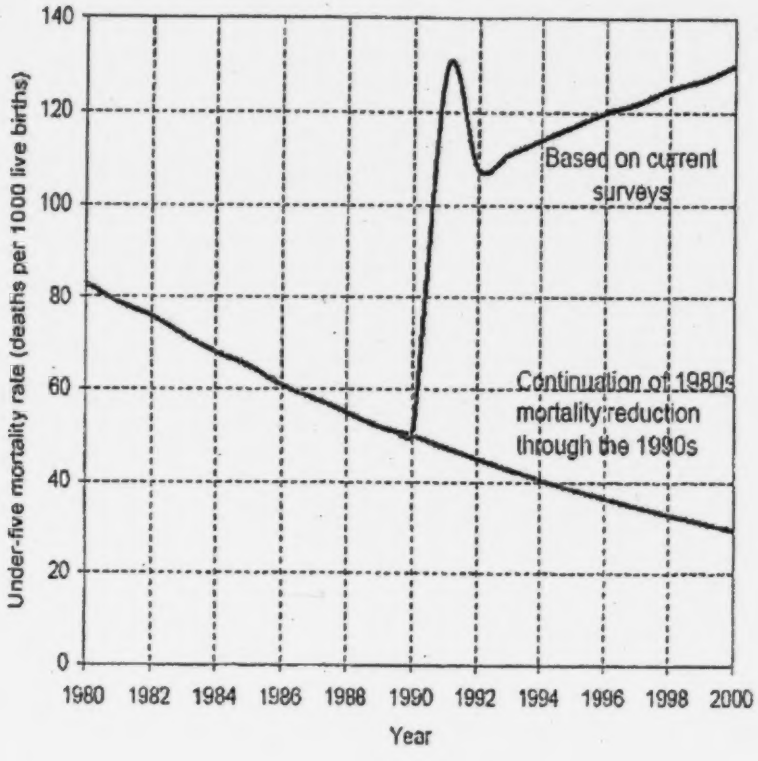
importation of the amount of food needed to feed the children of Iraq.

19. Each month, economic sanctions have helped cause the deaths of three to six thousand children in Iraq under five years of age. In 1992, the New England Journal of Medicine put the figure at 5,862 deaths per month for the first eight months of 1991 alone. (This does not include adults who have died in Iraq as a consequence of economic sanctions.)

20. In 2000, UNICEF issued a report entitled "UNICEF in Iraq." The report warned: "Mounting evidence shows that the sanctions are having a devastating humanitarian impact on Iraq." It quoted a 1997 report by the UN Human Rights Committee, which stated: "the effect of sanctions and blockades has been to cause suffering and death in Iraq, especially to children."

21. According to former UNICEF Director Carol Bellamy, sanctions imposed by the United States through the UN Security Council have reversed a decades-long decline in infant mortality in Iraq. Ms. Bellamy cites UNICEF reports that between 1991 and 1998, this reversal contributed to the deaths of half a million children under the age of five. One such UNICEF report appears at http://www.unicef.org/reseval/pdfs/irqu5est.pdf. It contains graphs such as the following, which depict the upsurge in child mortality in Iraq after 1990, the year economic sanctions were first imposed:

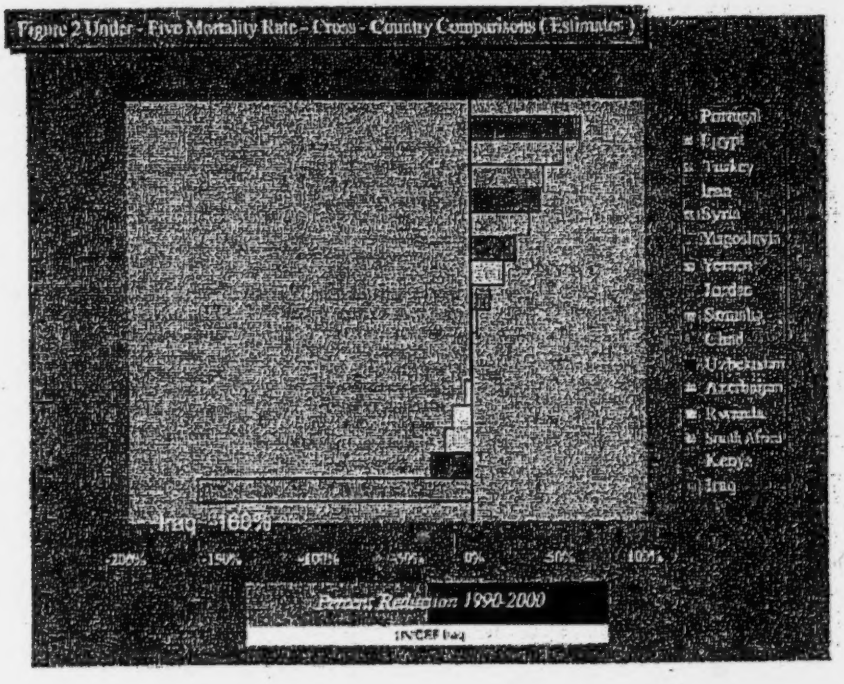
Chart 2:
Iraq - under-five mortality rate disparities



The chart shows the large disparity between the mortality rates based on recent surveys and what would have been the situation if the mortality trend in the 1980s had been continued through the 1990s.

22. In 2003 UNICEF published another report, entitled "The Situation of Children in Iraq." *See* http://www.unicef.org/publications/pub_children_of_iraq_en.pdf. That report states that a country like Iraq, which had an infant mortality rate of 40-60 deaths per 1,000 live births in 1990, should have had a rate of 20-30 by now. *Id.* at 13. Instead, the infant mortality rate

in southern and central Iraq climbed to 107 deaths per 1,000 live births by 1999. *Id.* The under-five mortality rate, meanwhile, rose from 56 deaths per 1,000 live births in 1985-89 to 131 in 1995-99. *Id.* The report contains the following chart, which compares the 160% increase in childhood mortality in Iraq to the (generally improving) trend in other countries:



Id. at 14. UNICEF attributes the increase in childhood mortality in Iraq to economic sanctions. *Id.* at 13.

23. In 1999, the Seattle Post-Intelligencer sent a team to Iraq to report on conditions there. The resulting articles, which are available on-line, document the deaths of Iraqi children due to the absence of medical supplies. *See* http://seattlepi.nwsource.com/iraq/life1.shtml.

BEST AVAILABLE COPY

24. The situation has not improved since the end of the Second Gulf War. UNICEF's website (http://www.unicef.org/infobycountry/iraq.html) currently reports:

> Even before the most recent conflict began, many children were highly vulnerable to disease and malnutrition. One in four children aged under five is chronically malnourished. One in eight children die before their fifth birthday.

25. Members of the United States government have publicly deemed these widespread deaths of infants and children in Iraq to be "worth it." In 1996 former Secretary of State (and then U.S Ambassador to the UN) Madeleine Albright was asked: "We have heard that a half million children have died. I mean, that's more children than died in Hiroshima. And, you know, is the price worth it?" Ms. Albright responded, "I think this is a very hard choice, but the price--we think the price is worth it." Ms. Albright has later expressed regret for this statement, but has insisted that sanctions are justified notwithstanding the "starvation" and "horrors" experienced by the Iraqi people. She claimed sanctions did not preclude food from reaching civilians in Iraq.

E. Humanitarian Exemptions to Economic Sanctions Have Not Stopped Children From Dying As a Result of Those Sanctions.

26. In theory, OFAC regulations allow food and medicine to be imported into Iraq. Food has also been brought into Iraq under the so-called "oil-for-food program," which began in 1996. But widespread sanctions-related infant and child mortality remain.

27. As a result, the first two directors of the oil-for-food program both resigned from the UN in protest. The first director, Denis Halliday, served as United Nations Assistant Secretary General and Humanitarian Coordinator in Iraq from September 1, 1997 until the end of September 1998. He later explained:

> Malnutrition is running at about 30 percent for children under 5 years old. In terms of mortality, probably 5 or 6 thousand children are dying per month. This is directly attributable to the impact of sanctions, which have caused the breakdown of the clean water system, health facilities and all the things that young children require. . . . I do not want to administer a program that results in these kind of figures.

A month after resigning, Mr. Halliday warned: "We are in the process of destroying an entire society. It is as simple and terrifying as that."

28. Mr. Halliday was succeeded by Hans von Sponeck, who served as UN Assistant Secretary General and Humanitarian Coordinator for Iraq. Mr. Von Sponeck served until February 2000, when he, too, resigned. Mr. von Sponeck stated, "I increasingly became aware that I was associated with a policy of implementing an oil-for-food program that could not possibly meet the needs of the Iraqi people." He, too, cautioned, "If we continue this policy when we fully recognize its consequences, we move toward genocide."

29. UNICEF reports confirm that the oil-for-food program "stopped the humanitarian situation from deteriorating, but did not greatly improve conditions for most Iraqis. This is partly because revenue has not

been sufficient to comprehensively rehabilitate the country's infrastructure." This assessment is confirmed by recent events. In 1996, the oil-for-food program was set up to allow $2 billion of oil to be exported every 180 days. Yet L. Paul Bremer, currently the U.S. civilian administrator for Iraq, has publicly estimated that rebuilding Iraq will cost $100 billion. The oil-for-food program never made capital of this kind available to the people of Iraq.

UNICEF's 2003 report, cited above, concludes:

> [S]ince the introduction of the Oil for Food Programme, the nutritional status of children has not improved. One in five children in the south and centre of Iraq remain so malnourished that they need special feeding, and child sickness rates continue to be alarmingly high.

See UNICEF, THE SITUATION OF CHILDREN IN IRAQ (2003) at 11.

F. International Law Does Not Allow States To Deprive Civilians, Especially Mothers, Infants, and Young Children, of Food, Medicine, and Other Necessities.

30. International law is the supreme law of the land under the United States Constitution. Accordingly, to the extent OFAC regulations are inconsistent with international law, they are unconstitutional.

31. International custom and general principles of law recognized by civilized nations do not allow states to deprive civilians, especially mothers, infants, and children under the age of fifteen, of food, medicine, and other necessities of life.

32. Several treaties signed by the United States reflect or embody these principles of international law. Perhaps the best known of these is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Article 23 of the Geneva Convention states that even in war, parties to the treaty:

> shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The Geneva Convention codifies international custom and general principles of law recognized by civilized nations and applies those principles of law to the exigencies of wartime. Civilized nations recognize that depriving civilians, especially mothers and children, of the necessities of life is illegal and immoral, even (but not especially) during war.

33. Other treaties to which the United States is a party also codify or reflect these general principles of international law. One is the Convention on the Prevention and Punishment of the Crime of Genocide. Article II of the Convention defines genocide to include killing or causing serious bodily or mental harm to members of a group as well as deliberately inflicting conditions of life calculated to bring about the partial or total physical destruction of the group. Legal scholars have suggested that economic sanctions against Iraq may have risen to the level of genocide within the meaning of the Convention.

34. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, likewise springs from principles of international law that condemn state deprivation of food, medicine, and other necessities. Article 25(1) of the Universal Declaration states that

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .

Article 25(2) provides that "[m]otherhood and childhood are entitled to special care and assistance." Civilized nations thus recognize that depriving people – particularly mothers, infants, and young children – of "food, clothing, housing and medical care and necessary social services" constitutes a deprivation of their human rights.

35. Another treaty, the Convention on the Rights of the Child, also springs from these principles

and affirms that states may not deprive children of their means of subsistence. Article 24 of the Convention on the Rights of the Child, for example, "recognize[s] the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." The Convention states that nations "shall strive to ensure that no child is deprived of his or her right of access to such health care services." Accordingly, the Convention requires countries to "take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; [and] (d) To ensure appropriate pre-natal and post-natal health care for mothers."

36. OFAC regulations, and the economic sanctions they enforce, violate international law and the Constitution because they deny civilians, particular mothers and young children, of food, medicine, and other necessities of life. OFAC, therefore, may not constitutionally prevent individuals like Mr. Sacks from bringing food or medical supplies to civilians in Iraq.

37. Congress has implicitly recognized that international law does not allow states to deprive civilians, especially mothers and children, of food, medicine, and other necessities. Accordingly, Congress imposed several limits on OFAC's power to impose economic sanctions.

38. 50 U.S.C. § 1702(b)(2), for example, provides that the "authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly . . . donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering." The only exceptions are for donations that: (1) would "seriously impair" the President's "ability to deal with any national emergency"; (2) are in response to "coercion against the proposed recipient or donor"; or (3) would endanger U.S. armed forces that "are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

39. 50 U.S.C. § 1702(b)(4) provides: "The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly . . . any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages."

40. OFAC's regulations exceed the authority Congress granted it.

G. OFAC Enforces Its Sanctions Regulations to Quash Conscientious Objectors.

41. Notwithstanding restrictions on OFAC's power imposed by international law, by the Constitution, and by Congress, OFAC has persisted in its efforts to punish Mr. Sacks and others who bring food and medicine to civilians in Iraq. Nearly four

years after Mr. Sacks responded to OFAC's "Prepenalty Notice" in 1998, OFAC sent a written "Penalty Notice" to Mr. Sacks. A true and correct copy of the Penalty Notice, which is dated May 17, 2002, is attached hereto as Exhibit 2. In it, OFAC informed Mr. Sacks:

> You admitted the [initial Prepenalty] Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval and also stated that you decided to violate the U.S.-Government's economic sanctions against Iraq as an act of civil disobedience. OFAC notes that you have admitted to Count 6 alleged in the Notice. The allegations included your currency travel-related transaction to/from/within Iraq absent prior license or other authorization from OFAC. Accordingly, OFAC finds that you have violated the Regulations as alleged in Count 6 of the Notice.

The Penalty Notice concluded that a $10,000 penalty was appropriate.

42 Mr. Sacks responded to the notice and noted (correctly) that he had not admitted the charges set forth in Count 6; he had only admitted to bringing medicine to Iraq. As Mr. Sacks explained:

> Count 6 [in your letter to us of December 3, 1998] deals only with "travel-related transactions ... the purchase of food, lodging, ground transportation and incidentals." I have never admitted to, nor supplied information about, any such transactions.

43. OFAC regulations theoretically allow a license to be granted to bring medicine to Iraq. But the regulations do not say how, when, or under what circumstances, OFAC will grant such a license. OFAC has accepted no restrictions on its power to deny such licenses.

44. In late 2002, Mr. Sacks sent a written request to OFAC under the Freedom of Information Act to assess OFAC's willingness to grant licenses to U.S. citizens to travel to Iraq with medical supplies. In his request, Mr. Sacks asked OFAC to provide, among other things:

> 1. All internal or external summaries of requests to the Office of Foreign Assets Control <u>since January 1991</u> by any individual, organization or business for license to <u>travel</u> to Iraq for the purpose of supplying medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs of the Iraqi population, including but

not limited to summaries that show the final determination or status of those requests.

2. All requests to the Office of Foreign Assets Control since January 1991 by any individual, organization or business for license to travel to Iraq for the purpose of supplying medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs of the Iraqi population.

3. All requests to the Office of Foreign Assets Control since January 1991 by any individual, organization or business for license to export to Iraq medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs of the Iraqi population.

4. All responses by the Office of Foreign Assets Control to those requests numbered 2 and 3 above, including but not limited to a denial or granting of a license, or a request for further information.

Mr. Sacks has sent two follow-up letters seeking a response to his request. To date, OFAC has not responded to this request, which has been pending for nearly a year.

45. OFAC has targeted other alleged violators of its ban on travel and importation of medical supplies to Iraq. Several people who traveled to Iraq with medical supplies have also received civil penalty notices (including the other individuals named in the Prepenalty Notice to Mr. Sacks). So did Voices in the Wilderness, an organization that, like Mr. Sacks, seeks to publicize the effects of U.S. economic sanctions and bring an end to their use.

46. In June 2003, OFAC sued Voices in the Wilderness to recover a civil penalty. Voices in the Wilderness consists of many individuals who oppose economic sanctions in Iraq. Several of these individuals have, like Mr. Sacks, brought medicine and medical supplies to Iraq.

47. Then, in early August, 2003, an organization called Ocwen Federal Bank called Mr. Sacks to advise that it was attempting to collect the civil penalty on behalf of the federal government. Mr. Sacks subsequently received an August 11, 2003 letter from Ocwen Federal Bank, a true and correct copy of which is attached hereto as Exhibit 3. That letter advised that Ocwen was attempting to collect Mr. Sacks' alleged "debt" to OFAC for the civil penalty.

48. OFAC clearly intends to sue to collect the civil penalty it claims Mr. Sacks owes. Consequently, a case of actual controversy now exists concerning Mr. Sacks' alleged obligation to pay such a penalty. Moreover, because Mr. Sacks has traveled to Iraq since the 1997 trip for which he was fined, a case of actual

controversy exists as to OFAC's authority to impose further penalties for these other trips.

49. Notwithstanding the fact that Mr. Sacks is the plaintiff in this cause, Mr. Sacks does not waive his right to have OFAC carry its burden of proving its entitlement to collect a civil penalty or any other matter on which OFAC has the burden of proof.

IV.
CAUSES OF ACTION

50. OFAC's attempts to collect a civil penalty are unlawful and unauthorized.

51. OFAC's Prepenalty and Penalty Notices state that OFAC is seeking to collect an civil penalty from Mr. Sacks for "currency transactions," namely "the purchase of food, lodging, ground transportation, and incidentals." Yet OFAC lacks the statutory authority to do so. 50 U.S.C. § 1702(b)(4) expressly denies OFAC "the authority to regulate or prohibit, directly or indirectly . . . any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages."

52. To the extent OFAC seeks to impose a penalty for the importation of medicine or medical supplies to Iraq, OFAC lacks the statutory authority to do so. 50 U.S.C. § 1702(b)(2) expressly denies OFAC the authority to ***regulate*** or prohibit, directly ***or indirectly*** . . . (2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to

relieve human suffering." OFAC's demand that Mr. Sacks obtain a license to donate medicine constitutes a prohibited attempt to directly or indirectly regulate (if not outright prohibit) those donations.

53. To the extent OFAC seeks to impose a penalty for the importation of medicine or medical supplies to Iraq, OFAC lacks the constitutional authority to do so. Government efforts to withhold food and needed medical supplies from innocent civilians, particularly mothers, infants, and young children, violate international law. This international law, to which the United States has acceded, is the supreme law of the land under the Supremacy Clause set forth in Article VI of the United States Constitution ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). OFAC may not punish Mr. Sacks in violation of international law and the Constitution of the United States.

54. According to OFAC's Prepenalty Notice, its claim for a civil penalty arises from conduct by Mr. Sacks that took place "on or about November 21-30, 1997." To the extent OFAC seeks a civil penalty for such conduct, it is untimely and is barred by the five-year statute of limitations that applies to the collection civil fines and penalties. 28 U.S.C. § 2461 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date

when the claim first accrued.

By its own admission, OFAC's claim for a civil penalty first accrued over five years ago.

V.
RELIEF REQUESTED

WHEREFORE Bert Sacks requests the following relief:

1. A declaration that OFAC is not entitled to collect a civil penalty from him for all of the following reasons:

a. OFAC lacks the statutory authority to regulate Mr. Sacks or others who seek to donate food and medicine to civilians in Iraq, and OFAC lacks the authority to prohibit Mr. Sacks or others from doing so;

b. OFAC lacks the statutory authority to regulate Mr. Sacks or others who seek to travel to Iraq for the purpose of donating food and medicine to civilians in Iraq, and OFAC lacks the authority to prohibit Mr. Sacks or others from doing so;

c. OFAC lacks the constitutional authority to prohibit Mr. Sacks or others from bringing food and medical supplies to Iraqi civilians, as international law to which the United States has acceded forbids the United States government from killing civilians, especially mothers, infants, and young children; and

d. OFAC's claims, to the extent they arise from conduct that took place five or more years

ago, are untimely and barred by the statute of limitations.

2. An order enjoining OFAC from further efforts to collect civil penalties from individuals who seek to travel to Iraq or donate food or medicine to civilians there; and

3. Such other and further relief as this Court deems just and proper.

DATED this 17th day of June, 2004.

s/Donald B. Scaramastra
WSBA#21416
GARVEY SCHUBERT BARER
1191 2nd Avenue, 18th Floor
Seattle, WA 98101
Telephone: 206-464-3939
Fax: 206-464-0125
E-Mail: dscar@gsblaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons listed below:

Joshua Z. Rabinovitz
U.S. Department of Justice
(Civil – 20 Mass)
Civil Division Federal Programs
20 Massachusetts Ave. NW
Washington, DC 20530
202-353-7633
Email: joshua.rabinovitz@usdoj.gov

Brian C. Kipnis
U.S. Attorney's Office
601 Union Street
Suite 5100
Seattle, WA 98101-3903
206-553-7970
Fax: 206-553-0116
Email: brian.kipnis@usdoj.gov

DATED this 17th day of June, 2004.

s/Donald B. Scaramastra
WSBA #21416
GARVEY SCHUBERT BARER
1191 2nd Avenue, 18th Floor
Seattle, WA 98101
Telephone: 206-464-3939
Fax: 206-464-0125
E-Mail: dscar@gsblaw.com

SEA_DOCS:830638.2

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

DEC 03 1998

FAC Nos. 1Q-162016 and 1Q-162433

PREPENALTY NOTICE

Dear Ms. Kelly and Messrs. Handelman, Mullins, Sacks, and Zito:

The Office of Foreign Assets Control ("OFAC") has reasonable cause to believe that you and Voices in the Wilderness ("VW") have engaged in certain prohibited transactions, detailed below, relating to the embargo against Iraq in 1997. Inasmuch as no license or approval had 'been issued by OFAC prior to such transactions, they violated the Iraqi Sanctions Regulations, 31 CPR Part"575 (the Regulations")" and underlying statutes and Executive Orders. See, specifically, §§ 575.204-.207 and 575.211 of the Regulations.

Violations

The violations of the Regulations and underlying statutes and Executive Orders for which this Notice is issued concern your and VW's exportation of donated goods, including medical supplies and toys, to Iraq absent specific prior authorization by OFAC and transactions relating to travel to Iraq and activities in Iraq. Additionally, the violations involve transactions for the purpose of, or which have the effect of, evading or avoiding, or which facilitate the evasion or avoidance of, any of the prohibitions of the Regulations, as well as a conspiracy formed for the purpose .of, engaging in transactions prohibited by the Regulation. In this regard,

EXHIBIT 1

VW has organized members to deliver goods to, Iraq in violation of the embargo and made express statements of the organization's knowledge of its violative actions. As to Messrs. Handelman and Mullins, the violations also concern the importation of goods and services of Iraqi origin. Specifically, the violations are as follows:

1. In March 1996, VW exported goods, including medical supplies, valued at approximately $18,000, to Iraq absent prior specific license or other authorization issued by OPAC;

2. In August 1996, VW exported goods, including medical supplies, valued at approximately $8,000, to Iraq absent prior specific license or other authorization, issued ,by OPAC;

3. In November 1996, VW exported goods, including medical supplies, valued at approximately $10,000, to Iraq absent prior specific license or other authorization issued by OPAC;

4. In November 1997, VW exported goods, including medical supplies and toys, valued at approximately $30,000-40,000, to Iraq absent prior specific license or other authorization 'issued by OPAC;

5. On or about November 21, 1997, Mr. Handelman exported film and videotape to Iraq, through Jordan;

6. Between on or about November 21-30, 1997, Messrs. Handelman, Mullins, Sacks and Zito, engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited

to, the purchase of food, lodging, ground transportation, and incidentals;

7. On December 3, 1997, Mr. Handelman imported goods and/or services of Iraqi origin, including photographic and video graphic services, into the United States at Detroit, Michigan. Upon entry of the goods, the United States Customs Service ("USCS") seized them (District Case Nos. 98-3801-000235). The goods included an Iraqi water bottle labeled, an Iraqi stamp, photographic film, video and audio tapes and/or cassettes, postcards, and assorted papers;

8. On December 3, 1997, Hr. Mullins imported goods and/or services of Iraqi origin, including photographic and/or video graphic services, into the United States at Detroit, Michigan. Upon entry of the goods, USCS seized them. (District Case No. 98-3801-00238). The goods included a necklace, a wooden drum, audio tapes, a computer disc, notebooks, pictures, and miscellaneous papers and cards;

9. In July 1998, VW exported goods to Iraq absent prior specific license or other authorization issued by OFAC; and

10. In September 1998, VW exported goods, including medical supplies, to Iraq absent prior specific license or other authorization issued by OFAC.

Proposed Penalty

Section 206 of IEEPA, 50 U.S.C. § 1705, provides, in part, for a civil penalty not to exceed $10,000 per violation. Section 566E of the Iraq Sanctions Act 6f 1990, PL.101-513, 104 Stat. 2049, provides, in part, for a civil penalty not to exceed $250,000 for each violation

occurring after November 5, 1990.[1] See, Regulations § 575.701. Pursuant to § 575~702 of the Regulations, you are hereby notified that OFAC intends to issue a claim against each of you and VW for a monetary penalty in the amounts' set forth below:

As to VW: $120,000, computed at $20,000 for each of Counts 1-4, 9 and 10

As to Mr. Handelman: $12,000, computed at $1,000 for each of. Counts 5 and 7, plus $10,000 for Count 6

As to Mr. Mullins: $11,000, computed at $1,000 for Count B, plus $10,000 for Count 6

As to Mr. Sacks: $10,000, for Count 6

As to Mr. Zito: $10,000 for Count 6

With respect to the disposition goods seized in the above-cited USCS District Cases from Messrs. Handelman and Mullins, we recommend that, inasmuch as such goods

---

[1] Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub.L. 101-410. 104 Stat. 890, 28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub.L. 104-134. sec. 31001(s)1). Apr. 26. 1996, 110 Stat. 1321-373 --.jointly, the "FCPIA"), requires each Federal agency with statutory authority to assess civil monetary penalties ("CMPs") to adjust CMPs for inflation according to a formula described in § 5 of the FCPIA. Accordingly, on October 23, 1996, OFAC published in the Federal Register the required amendment, effective October 21, 1996, to the Regulations adjusting its CMP to $275,000. See 61 FR 54936 at 54939

have been involved in the violation of U.S. law by U.S. persons, such goods be forfeited to the United States in accordance with USCS procedures.

Election of Proceedings. You have the right to make a written presentation to FAC within thirty (30) days of the mailing of this Notice. Such written presentation in response to this Notice need not be in any particular form, but it should contain a response to the allegations herein, and set forth the reasons why the penalty should not be issued, or if issued, why the amount should be less than that proposed in this Notice. Such response should be addressed to the Office of Foreign Assets Control (Attention: Civil Penalties), U.S. Department of the Treasury, 1500 Pennsylvania Avenue, N.,W., Washington, D.C. 20220.

2. In the event that you elect not to respond, OFAC will conclude that, you have decided not to submit any new facts or explanations for our consideration. In such instance, OFAC will issue a Penalty Notice in accordance with § 575.70(b) of the Regulations, finding a violation and assessing a penalty generally in the amount proposed herein.

3. Should you elect to resolve this matter informally absent any final agency finding of violation, you may initiate settlement negotiations by telephoning the OFAC staff member named below under "Contact Person" at any time before you are issued a Penalty notice. If the negotiations result in settlement, you are not required to make a written response to this Notice, which will be withdrawn without a, formal determination of violation, provided settlement occurs within the time period set in this Notice.

EXHIBIT 1

Collection

Section 575.705 of the Regulations provides that this matter shall be referred to the United States Department of Justice for collection if the penalty is not paid within thirty (30) days of the mailing of a Penalty Notice, should one be issued imposing a penalty pursuant to § 575.704 of the Regulations. Prior to such referral, OFAC may undertake administrative collection through the Office of Financial Management of the U.S. Treasury Department.

Contact

In view of the short response time, if you have any questions concerning this matter, please feel free to contact the appropriate member of my staff, Mrs. B.S. Scott, Chief, Civil Penalties Program, at telephone number (202) 622-6140.

Sincerely,

s/R. Richard Newcomb
Director
Office of Foreign Assets Control

SEA_DOCS:830747.1

EXHIBIT 1

This electronic version will be amended with a copy of the original letter.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

FAC No. IQ-162016 and IQ-162433 MAY 17 2002

PENALTY NOTICE

Dear Mr. Sacks:

A Prepenalty Notice ("Notice") dated December 3, 1998, was issued to you, by the Office of Foreign Assets Control ("OFAC") for having engaged in certain prohibited transactions relating to Iraq, as detailed in the Notice. No license or approval was issued by OFAC for these transactions. Accordingly, such transactions violated the Iraqi Sanctions Regulations, 31 CF.R Part 575 (the "Regulations"), promulgated pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq. ("IEEPA") and underlying statutes and Executive Orders. See §§ 575.207 and 515.211 of the Regulations.

Section 206 of IEEPA, 50 U.S.C. § 1705, provides, in part, for a civil penalty not to exceed $10,000 for each such violation. Section 586E of the Iraq Sanctions Act of 1990, PL.IOl-S13, 104 Stat. 2049, provides, in part, for a civil penalty not to exceed $250,000 for each violation occurring after November 5, 1990. Pursuant to §§ 575.702 of the Regulations, the Notice proposed a penalty against you in the amount of $10,000. You were advised of your right to make a written presentation to OFAC setting forth reasons why the penalty should not be issued or, if issued why the amount should be less than

that proposed. Such written response was required to be made within thirty (30) days of the mailing of the Notice.

OFAC mailed the Notice to you on December 3, 1998. Delivery is evidenced by a signed United States Postal Service Form 3811, Domestic Return Receipt.

By a response received at OFAC January 8, 1999, you made a written presentation setting forth reasons why you engaged in certain prohibited transactions relating to the embargo against Iraq. You admitted the Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval and also stated that you decided to violate the U.S. Government's economic sanctions against Iraq as an act of civil disobedience.

OFAC notes that you have admitted to Count 6 alleged in the Notice. The allegations included your currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. The Regulations prohibit persons subject to United States jurisdiction from engaging in any transaction relating to travel to Iraq. See § 575.207 of the Regulations. Accordingly, OFAC finds that you have violated the Regulations as alleged in Count 6 of the Notice.

After a careful review of the entire file, it is determined that you did violate IEEPA and the Regulations. It is further determined that, while some relief is warranted to take into account the fact that the instant violation was your first offense on record at OFAC, such relief must be balanced against aggravating factors present, specifically your willful violation of the Regulations.

Accordingly, the proposed civil penalty in the amount of $10,000 is hereby imposed upon you pursuant to § 575.704 of the Regulations.

A check payable to the "U.S. Treasury" in the amount of $10,000 should be sent within 30 days of the mailing of this Penalty Notice to the Office of Foreign Assets Control, (Attention: Civil Penalties), U.S. Treasury Department, 1500 Pennsylvania Avenue. N.W., Washington, D.C. 20220. Please note that interest, administrative charges and late fees will commence to accrue after 30 days of the mailing of the Penalty Notice. Under Public Law 97-365, 31 U.S.C. § 3717, interest at an annual rate inter of .5% and an administrative charge of $12.00 will be added monthly if the amount is not paid by the due date. Should the amount not be paid within ninety (90) days, an additional late charge of 6% will be added.

Please note that § 575.705 of the Regulations provides that this matter shall be referred for administrative collection measures or to the United States Department of Justice for collection if the penalty is not paid within 30 days of the mailing of the Penalty Notice.

Please further note that 31 U.S.C. § 7701 requires that a person assessed a penalty by a Federal agency furnish a taxpayer identification number/Social Security Number and also requires the agency to disclose that we intend to use such number for the purposes of collecting and reporting on any delinquent penalty amount in the event of a failure to pay the penalty imposed.

Sincerely,

EXHIBIT 2

Mr. Bertram Sacks 127 NW Bowdoin Place, #103 Seattle, Washington 98107

cc: U.S. Customs Service
Fines, Penalties & Forfeitures Office
(Attn: Mr. Don Zainea)
Patrick V. McNamara Bldg.
477 Michigan Avenue. Rm 200
Detroit, Michigan 48226

SEA_DOCS:830796.1

EXHIBIT 2

Office Hours (EST)
Monday through Thursday: 8:00 AM to 9:00 PM
Friday: 8:00 AM to 5:00 PM
Saturday: 8:00 AM to 12:00 PM
Sunday 12:00 Noon to 9:00 PM

OCWEN

August 11.2003

Ocwen Federal Bank FSB Account #: 506780
Federal Agency: DEPARTMENT OF THE TREASURY
DEPARTMENTAL OFFICES
U.S. Department of the Treasury-FMS Account 1#:
CB0916868
Name: Bertram Sacks
Balance due as of August 9, 2003 is $13767.08

Please be advised that Ocwen Federal Bank ("Ocwen") has been engaged by the U.S. Department of the Treasury-Financial Management Service on behalf of the above named Federal agency to resolve your delinquent debt. Please make your bank check or money order payable to US. Department of Treasury-FMS and mail to:

U.S. Department of the Treasury-FMS
Ocwen Federal Bank
PO Box 530289
Atlanta, GA 30353-0289

Our Toll Free Telephone Number is 888-778-2696

EXHIBIT 3

PRACTICES ACT

1. The amount of the debt as of August 9, 2003 is $13767.08.
2. The name of the creditor to whom the debt is owed is the above named Federal agency.
3. Unless you, within thirty (30) days after receipt of this notice, dispute the validity of the debt, or any portion thereof, the debt will be assumed to be valid by Ocwen Federal Bank FSB.
4. If you notify in writing within thirty (30) days after receipt of this notice, that the debt or any portion thereof is disputed, Ocwen will obtain verification of the debt or a copy of a judgment against you, whichever the case may be and a copy of such verification or judgment will be mailed to you by Ocwen.
5. Upon written request within thirty (30) days after receipt of this notice, Ocwen will provide you with the name and address of the original creditor, if different from the current creditor.

Mail correspondence to: Ocwen Federal Bank FSB,
Central Florida Research Parkway
PO Box 780549.
Orlando, FL 32878-0549

This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose.

Sincerely.
Ocwen Federal Bank, FSB

Ocwen, Ocwen Federal Bank, FSB, and the Ocwen logo are registered service marks of Ocwen Financial

EXHIBIT 3

2000 Ocwen Federal Bank, FSB. All rights reserved.

Detach Lower Portion and Return with Payment

_____	_____
Account Number	Exp. Date
_____	$_____
Card Holder Name	Pmt Amt
_____	_____
Signature of Card Holder	Date

Debtor Identification Number: CB0916868-000908243
Amount Enclosed: $_____

PO Box 780549
Orlando, FL 32878-0549

ADDRESS SERVICE REQUESTED

Date	Amount Due	Due Date
8/11/2003	$13767.08	August 9, 2003

#BWNHRMD 10678 33256
#0811 0920 0033 2565# 506780-4001

U.S. Department of the Treasury – FMS
Ocwen Financial
PO Box 530289
Atlanta, GA 30353-0289

Bertram Sacks
127 NW Bowdoin Pl, Apt. 103
Seattle, WA 98107-4964

EXHIBIT 3

OPPOSITION BRIEF

FILED
MAR 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-948

In the Supreme Court of the United States

BERTRAM SACKS, PETITIONER

v.

OFFICE OF FOREIGN ASSETS CONTROL, DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS LETTER
H. THOMAS BYRON III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

This case concerns the Iraqi Sanctions Regulations, which prohibited United States persons from conducting transactions related to travel to or within Iraq from 1990 until 2003. 31 C.F.R. 575.207 (Iraq Travel Ban). In addition, a separate provision of the regulations prohibited the export of goods and services to Iraq, but excepted donated foodstuffs provided for humanitarian purposes and donated medical supplies that had been specifically licensed by the Office of Foreign Assets Control (OFAC), an agency within the Department of the Treasury. 31 C.F.R. 575.205 (Medicine Restriction). After petitioner traveled to Iraq in violation of the Iraq Travel Ban, OFAC imposed a civil penalty pursuant to its enforcement powers. 31 C.F.R. 575.701. Petitioner brought suit to challenge the Iraqi Sanctions Regulations. The petition presents the following questions:

1. Whether petitioner has standing to challenge the facial validity of the Medicine Restriction.

2. Whether the Iraq Travel Ban was a valid exercise of the President's statutory authority under the United Nations Participation Act of 1945, 22 U.S.C. 287 *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 7, 9
Doe v. *Bolton*, 410 U.S. 179 (1973) 9
Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) 14
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 14
Munoz v. *Ashcroft*, 339 F.3d 950 (9th Cir. 2003) 13
Office of Foreign Assets Control v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004) 6, 11
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 10
Pennell v. *City of San Jose*, 485 U.S. 1 (1988) 9
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 14
The Paquete Habana, 175 U.S. 677 (1900) 13
Thomas v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000), cert. denied, 531 U.S. 1143 (2001) 10
United States v. *Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991) 14
United States v. *Richardson*, 418 U.S. 166 (1974) 8
Walsh v. *Brady*, 927 F.2d 1229 (D.C. Cir. 1991) 12

Constitution, treaties, statutes, regulations and rule: Page

U.S. Const. Art. III 8, 10
Geneva Convention Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 14
Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 14
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Chidren in Armed Conflict, *adopted* May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 236 14
S.C. Res. 661, para. 3, U.N. Doc. S/RES/661 (1990) 2
S.C. Res. 666, para. 8, U.N. Doc. S/RES/666 (1990) ... 3, 13
S.C. Res. 1483, para. 10, U.N. Doc. S/RES/1483 (2003) 4
United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 14
Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) 14
International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 2
50 U.S.C. 1702 (2000 & Supp. III 2003) 12
50 U.S.C. 1702(b)(2) 12
Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, §§ 586-586J, 104 Stat. 2047-2054 (50 U.S.C. 1701 note) 3, 13
§ 586C, 104 Stat. 2048 13
§ 586C(a), 104 Stat. 2048 3
§ 586C(b), 104 Stat. 2048 ..... 3, 13

Statutes, regulations and rule—Continued: Page

National Emergencies Act, 50 U.S.C. 1601 *et seq.* 2
United Nations Participation Act of 1945, 22 U.S.C. 287c 2
3 U.S.C. 301 2
28 U.S.C. 2462 ..... 10, 12
Exec. Order No. 12,722, 3 C.F.R. 294 (1991) 2, 11
Exec. Order No. 12,724, 3 C.F.R. 297 (1991) 2, 4, 11, 12, 13
§ 2, 3 C.F.R. at 297 2
§ 2(d), 3 C.F.R. at 297 2
§ 5, 3 C.F.R. at 298 2
Exec. Order No. 13,350 3 C.F.R. 196 (2005) 11
§ 1, 3 C.F.R. at 197 11
31 C.F.R.:
Sections 575.101 *et seq.* 3
Section 575.205 ..... 3, 4
Section 575.207 3
Section 575.501 4
Section 575.520 (2003) 4
Section 575.521 (2003) 4
Section 575.533 ..... 4, 11
Sections 575.701-575.705 4
Section 575.702 4
Sup. Ct. R. 35.3 6

Miscellaneous: Page

56 Fed. Reg. 2112 (1991) 3
68 Fed. Reg. (2003):
p. 38,188 4
p. 38,189 ..... 4, 9, 11
p. 61,363 4
Office of the United Nations High Commissioner on Human Rights, *Convention on the Rights of the Child* <http:/www.ohchr.org/english/countries/ratification/11.htm> 14

In the Supreme Court of the United States

No. 06-948

BERTRAM SACKS, PETITIONER

v.

OFFICE OF FOREIGN ASSETS CONTROL, DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-35A) is reported at 466 F.3d 764. The order of the district court (Pet. App. 36A-50A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. The petition for a writ of certiorari was filed on January 8, 2007. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following the invasion of Kuwait by the Iraqi army in August 1990, the United Nations and the United States acted quickly to sanction the then-government of Iraq.

On August 2, 1990, one day after the Iraqi army invaded Kuwait, the President signed Executive Order No. 12,722, which declared a national emergency and limited transactions with Iraq. 3 C.F.R. 294 (1991). Within four days, the United Nations Security Council passed Resolution 661, which called on all Member States to prevent their nationals from engaging in economic and financial transactions with Iraq, except for humanitarian donations of food and medical supplies. S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (1990).

On August 9, 1990, the President signed Executive Order No. 12,724, 3 C.F.R. 297 (1991), which superseded Executive Order No. 12,722. Executive Order No. 12,724 established detailed sanctions on the export of goods and services to Iraq, with an exception for humanitarian donations of food and medical supplies. § 2, 3 C.F.R. at 297. The order also restricted travel by United States persons to or within Iraq, although it exempted journalists, United States or United Nations officials, and persons assisting American citizens or permanent residents in fleeing Iraq. § 2(d), 3 C.F.R. at 297. Executive Order No. 12,724 authorized the Secretary of the Treasury to promulgate regulations necessary to implement and enforce its prohibitions. § 5, 3 C.F.R. at 298. As authority for the order, the President relied on the Constitution, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, Section 301 of title 3 of the United States Code, and, in light of the United Nations Security Council's adoption of Resolution 661, the United Nations Participation Act of 1945 (UNPA), 22 U.S.C. 287c. 3 C.F.R. 297 (1991).[1]

---

[1] Executive Order No. 12,722 cited the same authorities, with the exception of UNPA. 3 C.F.R. 297 (1991).

A month later, the United Nations Security Council passed Resolution 666, which addressed Iraq's diversion of donated humanitarian food and medical supplies to its military. Resolution 666 recommended "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666 ¶ 8, U.N. Doc. S/RES/666 (1990).

Shortly thereafter, on November 5, 1990, Congress passed the Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, §§ 586-586J, 104 Stat. 2047-2054 (50 U.S.C. 1701 note) (Iraq Sanctions Act). That Act specifically authorized the President to "continue to impose the trade embargo and other economic sanctions with respect to Iraq * * * pursuant to Executive Order[] Numbered 12724." § 586C(a), 104 Stat. 2048. Congress also required that transactions involving "foodstuffs * * * exempted 'in humanitarian circumstances'" be conducted "consistent with United Nations Security Council Resolution 666." § 586C(b), 104 Stat. 2048.

OFAC then issued the Iraqi Sanctions Regulations (Iraqi Sanctions). 56 Fed. Reg. 2112 (1991) (31 C.F.R. 575.101 *et seq.*). Two of those provisions are at issue in this case: 31 C.F.R. 575.207 and 31 C.F.R. 575.205.

The first regulation, 31 C.F.R. 575.207 (the Travel Ban), prohibited all United States persons from conducting "any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities * * * within Iraq," except for journalists, United States or United Nations officials, and persons assisting American citizens or permanent residents in fleeing Iraq. *Ibid.*

The second regulation, 31 C.F.R. 575.205 (the Medicine Restriction), banned the export of goods, services,

and technology to Iraq. Consistent with Executive Order No. 12,724 and United Nations Security Council Resolution 666, the OFAC regulations retained an exception for "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has been specifically licensed [by OFAC]," 31 C.F.R. 575.205, pursuant to a licensing program established for that purpose. 31 C.F.R. 575.501; 31 C.F.R. 575.520, 575.521 (2003), repealed by 68 Fed. Reg. 61,363 (2003). OFAC's regulations provided for enforcement through an administrative process for assessment of civil penalties for violations. 31 C.F.R. 575.701-575.705.

Shortly after the liberation of Iraq in 2003, the United Nations lifted all non-weapons trade restrictions against Iraq. S.C. Res. 1483, ¶ 10, U.N. Doc. S/RES/1483 (2003). OFAC then issued a general license that permitted, on a prospective basis, substantially all Iraq-related transactions that had previously been prohibited, including unlicensed donations of humanitarian supplies. 68 Fed. Reg. 38,188, 38,189 (2003) (31 C.F.R. 575.533).

2. Petitioner Bertram Sacks, along with several other members of an unincorporated association known as Voices in the Wilderness (Voices), traveled to Iraq in November 1997 for assertedly humanitarian purposes. Pet. App. 4A-5A, 36A-37A. Following that trip, OFAC issued petitioner and Voices a Prepenalty Notice pursuant to 31 C.F.R. 575.702. Pet. App. 9A-10A, 38A. Of the ten specific violations listed, six of them accused Voices of exporting medical supplies and/or other goods "absent prior specific license or other authorization." *Id.* at 10A. Petitioner was individually charged with only one violation:

> 6. Between on or about November 21-30, 1997, Messrs. Handleman, Mullins, Sacks and Zito engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals.

Ibid.

For petitioner, the Prepenalty Notice proposed a $10,000 penalty. Pet. App. 10A, 38A. Petitioner exercised the opportunity provided in the Prepenalty Notice to respond to the charges in writing. *Ibid.* Although individually charged only with violating the Travel Ban, petitioner's written response admitted that he had violated not only the Travel Ban, but also the Medicine Restriction: "You are correct to state in your prepenalty letter (12/3/98) that I brought medical supplies and toys to Iraq absent prior OFAC approval." *Id.* at 10A.

OFAC issued a formal Penalty Notice on May 17, 2002, Pet. App. 38A, which described petitioner's written response as admitting "the Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval," *id.* at 11A. Citing this willful violation of the Iraqi Sanctions, OFAC imposed a $10,000 penalty on petitioner and demanded payment within thirty days. *Id.* at 11A, 38A. After petitioner failed to pay the penalty, the Treasury Department sought to collect the debt through a contract with Ocwen Federal Bank, on behalf of the United States. *Ibid.*

3. On January 14, 2004, petitioner brought this suit in the United States District Court for the Western District of Washington against OFAC and its then-director,

Richard Newcomb (collectively OFAC).[2] He requested declaratory and injunctive relief on the theory that the Medicine Restriction and Travel Ban lacked statutory authority and violated principles of international law. Pet. App. 11A, 38A. Petitioner also alleged that OFAC's claims against him were time-barred. *Ibid.* The district court granted OFAC's motion to dismiss petitioner's complaint for failure to state a claim. *Id.* at 11A, 36A.

The district court held that the Travel Ban was validly promulgated and enforceable because Congress's enactment of the Iraq Sanctions Act "ratified the Executive Order on which the Iraq Travel Ban and Medicine Restriction were based." Pet. App. 42A. As to the Medicine Restriction, the district court agreed with the analysis in *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004), holding that, regardless of whether or not petitioner had standing, this restriction constituted a "valid exercise of authority granted to OFAC through Executive Order No. 12,724 and the Iraqi Sanctions Act." Pet. App. 40A-44A. Further, the court found that international law did not provide a ground upon which to invalidate those otherwise valid regulations. *Id.* at 11A, 44A-45A.

After determining that the collection effort was not time-barred, the district court nevertheless sua sponte interpreted OFAC's regulations as precluding recourse to a private collection agency. Pet. App. 46A-49A. The district court enjoined OFAC from using any means to collect the civil penalty other than referral to the Department of Justice for litigation in federal court. *Id.* at 11A, 49A.

---

[2] Pursuant to this Court's Rule 35.3, OFAC Director Adam Szubin has been automatically substituted as a respondent.

4. Petitioner appealed the district court's dismissal, arguing that the Travel Ban and Medicine Restriction were invalidly promulgated. Pet. App. 11A-12A. The government cross-appealed the district court's determination that the Treasury Department could not use a private contractor collection agency to collect petitioner's debt. *Id.* at 12A. The court of appeals affirmed the district court's order. *Ibid.*

The court of appeals first found that petitioner had standing to challenge the Travel Ban, but not the Medicine Restriction. Pet. App. 13A-22A. The court held nonjusticiable petitioner's attack on the Medicine Restriction because he failed to allege any concrete and imminent injury-in-fact caused by that restriction. *Id.* at 15A-16A, 21A-22A. The court rejected petitioner's contention that he had been punished by OFAC for violating the Medicine Restriction, concluding that a penalty had been assessed against him only for violating the Travel Ban. The court further found that petitioner's membership in Voices did not create a "realistic danger of [his] sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 16A-17A (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Citing the fact that the government had never, during the prior eight years, charged or penalized petitioner for his self-confessed violation of the Medicine Restriction, the court of appeals rejected petitioner's contention that he faced imminent enforcement action for that violation. *Id.* at 17A-22A.

In upholding the Travel Ban, the court of appeals rejected petitioner's argument that Congress, in enacting IEEPA, had curtailed the President's power under UNPA to implement Security Council resolutions, finding that Congress had not intended IEEPA to limit the

President's authority under UNPA or to function as a partial, *sub silentio* repeal of that statute. Pet. App. 22A-26A. After considering the text of IEEPA and its legislative history, the court of appeals also rejected petitioner's argument that IEEPA was intended to codify certain international legal standards posited by petitioner. *Id.* at 26A-27A. The court of appeals accordingly affirmed the district court's holding that the medical supplies exception to Presidential power, embodied in IEEPA, did not limit the President's ability to ban travel pursuant to UNPA. *Id.* at 27A.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, because of changes in the applicable regulatory regime, the questions presented have very limited continuing relevance. Further review is therefore unwarranted.

1. Petitioner argues (Pet. 15-16) that the court of appeals' ruling on standing makes it "difficult to conceive how [OFAC's] authority to directly restrict humanitarian donations of food and medicine could ever be subjected to review." However, as this Court has made clear, the fact that there might be no plaintiff with standing does not lessen the burden of proving it in any individual case. *United States* v. *Richardson*, 418 U.S. 166, 179 (1974). In any event, even if any such concern could justify review by this Court, it is absent here. The court of appeals did not establish any novel standing requirements for challenging OFAC's authority with respect to the Iraqi Sanctions, but instead applied well-established requirements of Article III standing. Pet. App. 13A-14A. Petitioner's challenge to the Travel Ban—the provision under which he was penalized—pro-

ceeded on the merits, while his attack on the Medicine Restriction failed for lack of standing and ripeness, in light of the fact that in the eight years following petitioner's admitted violation of the restriction, he had never been penalized for it. *Id.* at 15A, 20A-21A. Should OFAC ever penalize petitioner in the future for violating the Medicine Restriction, he would obviously then satisfy the injury-in-fact requirement and have standing to challenge the legitimacy of the Medicine Restriction. *Id.* at 21A.

a. The court of appeals correctly held that petitioner's asserted fear of future penalty proceedings for violating the Medicine Restriction does not confer standing because petitioner has not alleged a concrete and imminent injury-in-fact caused by the Medicine Restriction. Pet. App. 17A-21A. By the time petitioner filed his complaint in 2004, the Medicine Restriction, for all practical purposes, had already been rescinded with respect to future transactions by OFAC's issuance of a general license in June of 2003. 68 Fed. Reg. at 38,189. Thus, any supposed threat of penalty proceedings could only relate to already completed violations and could not have served to inhibit petitioner's present or future conduct. That fact distinguishes this case from each of the cases relied upon by petitioner. See *Pennell* v. *City of San Jose*, 485 U.S. 1, 7-10 (1988); *Babbitt*, 442 U.S. at 298-300; *Doe* v. *Bolton*, 410 U.S. 179, 188-189 (1973).

With respect to petitioner's past violations, OFAC has taken no action to charge petitioner during the last eight years, despite his admission that he violated the Medicine Restriction numerous times. Pet. App. 19A-20A. Petitioner relies (Pet. 19) on OFAC's 2004 reservation of the right to act "in response to [petitioner's] eight other trips to Iraq." But that statement did not mention

the Medicine Restriction at all, and said nothing about whether petitioner violated the Medicine Restriction between 1999 and 2003, the only period in which the Medicine Restriction was in effect and as to which the limitations period had not expired at the time of the statement. Pet. App. 20A-21A; see 28 U.S.C. 2462. As the court of appeals noted (Pet. App. 21A), petitioner's complaint did not allege that he violated the Medicine Restriction during that time. The mere existence of a generalized possibility of future enforcement does not satisfy the Article III case or controversy requirement. *O'Shea* v. *Littleton*, 414 U.S. 488, 494-495 (1974); *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc), cert. denied, 531 U.S. 1143 (2001).

b. Petitioner's other theories of standing also fail. The court of appeals properly rejected petitioner's contention (Pet. 16-17) that he has standing to challenge the Medicine Restriction because the particular Travel Ban violation for which he was penalized happened to involve the delivery of medicine. The court correctly recognized that OFAC had imposed a penalty for violation of the Travel Ban, not the Medicine Restriction. Pet. App. 16A. Although it is true that OFAC imposed the travel sanction on the basis of petitioner's admitted travel for the purpose of delivering food and medicine (as well as toys), that does not change the legal basis of the penalty. *Id.* at 16A, 43A n.3. The Travel Ban and Medicine Restriction proscribe different types of conduct, and a penalty imposed for violating one does not confer standing to challenge the other. *Id.* at 43A n.3; cf. 31 C.F.R. 575.205, 575.207.

Nor, as the court of appeals recognized, does petitioner's membership in Voices confer standing. Pet.

App. 16A-17A. Because nothing in the Amended Complaint or record indicates that petitioner has any financial responsibility for the fine imposed on Voices, petitioner's membership alone does not create a realistic danger of direct injury to him as a result of the Medical Restriction's enforcement against Voices. *Ibid.*

2. a. With respect to the merits, the court of appeals' opinion in this case is the only appellate decision to address the issues presented by the petition. Moreover, the court of appeals' decision and that of the district court are consistent with the only other district court decision on point, *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004), in which the District Court for the District of Columbia held that the Iraqi Sanctions were a valid and enforceable exercise of the President's authority under UNPA, *id.* at 76-78. There is therefore no conflict among the lower courts for this Court to resolve.

In addition, questions regarding the validity of the Travel Ban and Medicine Restriction lack ongoing significance. Shortly after the liberation of Iraq, OFAC issued a general license permitting, on a prospective basis, substantially all Iraq-related transactions that had been previously prohibited. 68 Fed. Reg. at 38,189 (codified at 31 C.F.R. 575.533). Executive Order No. 13,350, 3 C.F.R. 196 (2005), terminated the national emergency declared by Executive Order No. 12,722, and revoked Executive Order No. 12,724. While Executive Order No. 13,350 explicitly reserved the government's right to bring proceedings based on violations committed before the Iraqi Sanctions expired, § 1, 3 C.F.R. at 197 (2005), the number of such violations for which the questions presented may have any significance is quite limited. Because the statute of limitations for bringing

such actions is five years, enforcement is now possible only for violations that occurred between 2002 and 2003. See 28 U.S.C. 2462; Pet. App. 9A, 21A.

In addition, the unique situation that resulted in the United Nations Resolutions, Executive Orders, Iraq Sanctions Act, and OFAC regulations is unlikely to recur. Although the pre-2003 Iraqi Sanctions may be similar in some respects to restrictions against other foreign states (Pet. 22-23), any future claims will necessarily arise out of the relationship between specific administrative regulations and Executive Orders, and will need to be assessed in light of their own particular factual circumstances.

b. In any event, the decisions of the lower courts upholding the Travel Ban's validity, Pet. App. 22A-27A, 39A-42A, are correct. As the court of appeals correctly held, IEEPA's medical supplies exception to Presidential power does not limit the President's power under UNPA to enact the Travel Ban. *Id.* at 22A-27A. First, the IEEPA medical supplies exception, by its terms, applies only to 50 U.S.C. 1702 (2000 & Supp. III 2003), see 50 U.S.C. 1702(b)(2), and so does not alter the President's authority under UNPA or the Iraq Sanctions Act. Second, even if IEEPA did apply in this case, that statute would not limit enforcement of the Travel Ban because a general prohibition against travel-related transactions is not an indirect regulation on the importation or exportation of goods. See *Walsh* v. *Brady*, 927 F.2d 1229 (D.C. Cir. 1991).

Petitioner argues (Pet. 27-28) that the Executive Order authorizing the Travel Ban is incompatible with the expressed or implied will of Congress. As the lower courts explained, however, Executive Order No. 12,724 was adopted and approved by Congress with the pas-

sage of the Iraq Sanctions Act. Pet. App. 22A-27A, 39A-40A. That Act specifically provided that the exemptions in Resolution 661 "shall be limited to foodstuffs that are to be provided consistent with United Nations Security Council Resolution 666 (1990) and other relevant Security Council resolutions." § 586C(b), 104 Stat. 2048. Security Council Resolution 666 recommended "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666 ¶ 8, *supra*. Thus, Congress clearly contemplated the adoption of an administrative scheme like that established by the OFAC Iraqi Sanctions in order to implement the relevant U.N. resolutions. § 586C, 104 Stat. 2048.

c. While not raised before the court of appeals (and thus waived in this Court), petitioner's argument that the Medicine Restriction and Travel Ban violate international law was fully considered and properly rejected by the district court. Pet. App. 44A-45A.

Petitioner's reliance (Pet. 23) on customary international law is misplaced. This Court's reliance on the "customs and usages of civilized nations" in *The Paquete Habana*, 175 U.S. 677, 700 (1900), was predicated on the absence of any treaty, "controlling executive or legislative act or judicial decision," *ibid.* In this case, there is no occasion to refer to customary international law because UNPA and the Iraq Sanctions Act of 1990, in conjunction with Executive Order No. 12,724, address the same subject and specifically authorize the Travel Ban and Medicine Restriction. See *Munoz* v. *Aschcroft*, 339 F.3d 950, 958 (9th Cir. 2003) ("'in enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by

international law,' so long as the legislation is constitutional") (quoting *United States* v. *Aguilar*, 883 F.2d 662, 679 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991)).

The district court also correctly held that the sources of international law relied upon by petitioner (Pet. 23-27) do not create legal rights that petitioner can invoke. Pet. App. 44A-45A. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004). The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, does not provide privately enforceable rights. Cf. *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 n.14 (1950); *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (accepting the assumption that the enforcement scheme of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, "would, absent some other provision of law, preclude [petitioner's] invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right"). And the United States has not ratified, although it has signed, the United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3. See Office of the United Nations High Commissioner on Human Rights, *Convention on the Rights of the Child* <http://www.ohchr.org/english/countries/ratification/11.htm> (status of ratification).[3]

---

[3] Petitioner's reliance (Pet. 26) on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *adopted* May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 236, is particularly misplaced. That protocol does not address

In any event, the requirement—in conformity with United Nations Security Council Resolution 666—that humanitarian supplies be provided pursuant to the oversight of OFAC does not violate any of those international agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS LETTER
H. THOMAS BYRON III
Attorneys

MARCH 2007

---

sanctions adopted pursuant to a Security Council Resolution, but instead refers to the measures that ratifying members should take to assure that their armed forces do not have members younger than eighteen.